123-147

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 329. 54

A. M. HEFNER, MRS. A. M. HEFNER, IRA BABCOCK AND MRS. IRA BABCOCK, PLAINTIFFS IN ERROR,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED SEPTEMBER 29, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 22, 1887.

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1 Pleas in the circuit court of the United States for the southern district of Iowa, central division, at a term thereof begun and holden at the United States court-house, at the city of Des Moines, in said district, on the second Tuesday of May, 1884, it being the thirteenth day of May, A. D. 1884, before the Hon. David J. Brewer, Hon. James M. Love, and Hon. O. P. Shiras, judges.

Attest: E. R. MASON, *Clerk.*

2 Be it remembered that heretofore, to wit, on the 5th day of July, 1883, The Northwestern Mutual Life Insurance Company, by Nourse & Kauffman, its attorneys, filed in the clerk's office of the circuit court of the United States for the southern district of Iowa, central division, a petition against A. M. Hefner *et al.;* which said petition is in the words and figures following, to wit:

3 *Petition.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
A. M. HEFNER, Mrs. A. M. HEFNER, his Wife; IRA BABCOCK, Mrs. IRA BABCOCK, his Wife. } At Law.

The plaintiff, The Northwestern Mutual Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen of said State, claims of the defendants, A. M. Hefner, Mrs. A. M. Hefner, his wife; Ira Babcock, Mrs. Ira Babcock, his wife, who are residents and citizens of the State of Iowa, the present and immediate possession of the following-described real estate, to wit:

The southeast qr. of section twenty-six (26), in township number seventy-six (76) north, of range thirty-two (32) west, of the 5th
4 P. M., Iowa; and for cause thereof shows to the court as follows, to wit: That heretofore, to wit, on the 23rd of August, 1870, Isaac Bates was the absolute owner in fee of the said above-described real estate; that on the said day he, together with his wife, Laura Bates, made execution and delivered to pl'ff a mortgage upon the said real estate to secure various sums of money, as in the said mortgage more fully described, which said mortgage was recorded on the 29th day of August, 1870, in the county recorder's office in the county of Adair, Iowa, being the county in which the said lands are situated.

That thereafter the said Isaac Bates having failed to pay the said mortgage, the plaintiff herein, The Northwestern Mutual Life Insurance Company, on the 31st of October, 1876, filed its bill for the foreclosure of the said mortgage against the said Isaac Bates and wife and various other parties, including James Callanan, as def'ts.

That in said proceedings in foreclosure a subpœna in chancery was duly issued, and was duly served by the United States marshal personally upon the said def'ts, including the said James Callanan.

That thereafter such proceedings were had as that on the 21st day of May, 1877, a decree of foreclosure was duly entered against all of the said defendants, including the said Jame- Callanan, in which it was ordered and adjudged that the right, title, and equity of redemption of the said James Callanan and other def'ts be, by a sale of the said mortgaged premises under the said foreclosure decree, forever barred and foreclosed, and it was further decreed that the purchaser at such sale should take said premises at such sale by title absolute, as against all of the said def'ts, including the said James Callanan.

That thereafter, to wit, on the 5th day of October, E. R. Mason,
6 the master in chancery appointed in said decree, made sale of the said property, and at the said sale the pl'ff herein became the purchaser thereof, and received the master's deed therefor, which said deed is dated on the 5th day of October, 1883, and is recorded in Adair county, Iowa, in book 33, page 52, of the records of deeds of said county.

By reason of the premises the pl'ff is now the legal owner and holder of the said property and entitled to the immediate possession thereof.

That the def'ts, A. M. Hefner and Ira Babcock, as pl'ff is informed and believes, are in the actual possession of the said property, and have been for more than three years last past, and that the said parties, as pl'ff is informed and believes, claim under the said James Callanan, and that whatever claim they may have thereof they have acquired since the said proceedings in foreclosure were begun against
7 the said James Callanan, and the said def'ts herein, together with their wives, have no right whatever to the possession thereof, as against the pl'ff herein, whose title was acquired under the said decree of foreclosure, to which proceedings said Callanan, under whom def'ts claim, was a party as aforesaid. Whereof pl'ff prays for judgment against the said def'ts for the present and immediate possession of the said land, and that a writ of possession issue to put pl'ff in possession thereof, and that pl'ff have judgment for the sum of five hundred dollars as his damages for the wrongful detention thereof and for costs of this suit.

(Signed) NOURSE & KAUFFMAN,
For Pl'ff.

STATE OF IOWA, *Polk County,* } *ss:*

I, B. F. Kauffman, on oath state that I am the attorney for the plaintiff in the above-entitled cause, and that I was the attorney who prosecuted the foreclosure proceedings in the said peti-
8 tion referred to, and that I am as fully acquainted with the facts stated in the foregoing petition as is the pl'ff, and I believe that the statements thereof are true.

(Signed) B. F. KAUFMAN.

Subscribed and sworn to by the said B. F. Kauffman before me, Horace G. Moore, a notary public, and in my presence on this 29th day of June, 1883.

[SEAL.] (Signed) HORACE G. MOORE,
Notary Public.

Endorsed: In the circuit court of the United States, southern district of Iowa, central division. 3079. Law. The Northwestern Mutual Life Ins. Co. *vs.* A. M. Hefner *et al.* Petition at law. Nourse & Kauffman for pl'ff. Filed July 5th, 1883. E. R. Mason, clerk.

9 And on the 9th day of July, 1883, a summons was issued out of the clerk's office in said cause; which said summons, together with the marshal's return of service thereon, was filed in said cause October 1st, 1883, in the words and figures following, to wit:

10 UNITED STATES OF AMERICA,
Central Division, Southern District of Iowa:

To the marshal of the said district of Iowa:

In the name of the President of the United States, you are hereby commanded to summon A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, Mrs. Ira Babcock, citizens of the State of Iowa, to appear before the honorable circuit court of the United States in and for the southern district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Des Moines on the third Tuesday of October next, it being the 16th day of October, A. D. 1883, then and there to answer unto The Northwestern Mutual Life Insurance Company, a citizen of the State of Wisconsin, in a plea for the immediate possession of the southeast quarter of section twenty-six (26), township (76) seventy-six north, of range thirty-two (32) west, 5th P. M., Iowa, to the damage of said plaintiff in the sum of five
11 hundred dollars, with interest and costs. Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Des Moines, this the 9th day of July, A. D. 1883, and of the Independence of the United States the 108th year.

[SEAL.] (Signed) EDWARD R. MASON,
Clerk U. S. Circuit Court, District of Iowa, Central Division.

This writ came into my hands for service on the 9th day of July, A. D. 1883, and I served the same on the within-named A. M. Hefner and Mrs. A. M. Hefner, Ira Babcock and Mrs. Ira Babcock, on the 20th day of September, 1883, by reading the same to each one of them and by delivering a true copy to each at near Fontanelle, in the county of Adair and State of Iowa.

(Signed) R. ROOT, *U. S. Marshal,*
By S. S. ETHRIDGE, *Deputy.*

Marshal's fees:

Mileage, — miles	$7 80
Service on 4	8 00
Copy	2 00
	$17 80

12 Endorsed: No. 3079. Law. Summons. Circuit court of the United States, district of Iowa. Northwestern Mutual Life Ins. Co. *vs.* A. M. Hefner *et al.* Nourse & Kauffman, attorney for plaintiff. Residence, Des Moines, Iowa. Filed Oct. 1st, 1883. Ed. R. Mason, clerk.

13 And on the 1st day of October, 1883, a trial notice was filed in said cause in the words and figures following, to wit:

14 *Trial Notice.*

In the United States Circuit Court, Southern District, Central Division.

THE NORTHWESTERN MUTUAL LIFE INS. CO. *vs.* HEFNER *et al.* } At Law.

To the clerk of said court:

You will please take notice that the above-entitled cause will be for hearing and trial at the coming term of court, commencing Oct. 16th, 1883, and you will please put it on trial docket accordingly.

(Signed) NOURSE & KAUFFMAN.
Att'ys for Plff's'.

Endorsed: 3079. Law. Northwestern Mutual Life Ins. Co. *vs.* Hefner *et al.* Trial notice. Filed Oct. 1st, 1883. E. R. Mason, clerk.

15 And on the 17th day of October, 1883, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

16 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1883.

NORTHWESTERN MUTUAL LIFE INSURANCE CO. *vs.* A. M. HEFNER *et al.* } No. 3079. Law.

WEDNESDAAY, *October 17th*, 1883.

This cause coming on this day for hearing defendant *was* given until October 25th, 1883, to file answer herein.

17 And on the 23rd day of October, 1883, the defendants, A. M. Hefner *et al.*, by J. R. Barcroft and C. H. Gatch, their attor-

neys, filed in said cause a motion for more specific statement in plaintiff's petition; which said motion is in the words and figures following, to wit:

18 *Motion.*

Circuit Court of United States, Southern District of Iowa, Central Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE CO.
vs.
A. M. HEFNER *et al.*

And now come the defendants and move the court to strike from the petition all that part thereof after the words "for cause thereof shows to the court as follows, that," to and including the words "by reason of the premises," and that plaintiff be required to attach to its said petition an abstract of the title relied on, as required by code, section 3251; or that if said portion shall not be stricken out plaintiff be required to make it more specific by setting out a copy of the bill filed Oct. 31st, which it is alleged was a bill for the foreclosure of said mortgage; that *he* also set out a copy of what is alleged to have been a subpœna in chancery in said action,
19 and a copy of the return of service, which it is alleged was duly made by the marshal personally, and a copy of the decree rendered therein, and a copy of the master's deed, alleged to have been executed in pursuance thereof.

And for cause of said motion shows—

1st. That this is an action to recover possession of real estate based upon the legal title of plaintiff and the wrongful possession of the defendants, and the matter which it is sought to strike is mere matter of evidence and wholly immaterial to the full statement of plaintiff's cause of action.

2nd. The allegation that said Bates was owner at the time stated does not dispense with the necessity imposed by section 3251 of the code of filing abstract showing title in him. Plaintiff must recover upon the strength of *his* own title and attach an abstract of it to *his* petition.

20 3rd. If the evidence can be properly plead the facts should be specifically stated. The bill, subpœna, return of service, decree, and master's deed should be set out in full. The allegations in the petition with reference to them are conclusions of the pleader as to the character of the bill, of the writing called a subpœna, of its service and return, of the effect of the decree, and the master's deed, which, upon demur-er to the petition in the nature of a demur-er to evidence, would be questions for the court upon the inspection of the record, which should therefore be set out at length.

(Signed) J. R. BARCROFT AND
C. H. GATCH,
Attorneys for Defendant-.

Endorsed: United States circuit court, southern district, central division. N. W. Mutual Life Insurance Co. *vs.* A. M. Hefner

et al. Motion to strike and to make more specific, etc. Filed Oct. 23, 1883. Ed. R. Mason, clerk. J. R. Bancroft & C. H. Hatch, atty's for def'ts.

21 And on the 25th day of October, 1883, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

22 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1883.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
A. M. HEFNER *et al.*
} No. 3079. Law.

THURSDAY, *October 25th*, 1883.

This cause *coming* on this day for hearing, and defendant was given thirty days in which to file answer herein, if he shall elect to waive the motion now on file, and this cause is continued.

23 And on the 10th day of April, 1884, the plaintiff, by its attorneys, filed in said cause a trial notice in the words and figures following, to wit:

24 *Trial Notice.*

In the United States Circuit Court, Southern District of Iowa, Central Division.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

vs.

A. M. HEFNER *et al.*

To the clerk of said court:

The above-entitled cause will be for trial on the issues of law and fact therein at the next ensueing term of said court.

(Signed) NOURSE & KAUFMAN,
Att'ys for Plaintiff.

Endorsed: No. 3079. Law. N. W. M. L. Ins. Co. *vs.* Hefner *et al.* Trial notice. Filed April 10th, 1884. Ed. R. Mason, clerk. Nourse and Kauffman, att'ys for pl'ffs.

25 And on the 26th day of April, 1884, the defendants, by their attorneys, filed in said cause a trial notice in the words & figures following, to wit:

26 *Trial Notice.*

Circuit Court of the United States, Southern District of Iowa, Central Division.

N. W. MUTUAL LIFE INS. CO. *vs.* A. M. HEFNER *et al.*

E. R. Mason, clerk:

The above cause will be for trial at the coming May term of said court.

April 25th, '84.

(Signed) C. H. GATCH,
Sol'r for Def't Callanan.

Endorsed: U. S. circuit court. N. W. Mutual Life Ins. Co. *vs.* A. M. Hefner *et al.* 3079. Law. Trial notice. Filed April 26th, 1884. Ed. R. Mason, clerk. C. H. Gatch, sol'r.

27 And on the 3rd day of May, 1884, the plaintiff, by its attorneys, filed in said cause an amendment to its petition in the words and figures following, to wit:

28 *Amendment to Petition.*

In the United States Circuit Court, Southern District of Iowa, Central Division.

NORTHWESTERN MUTUAL LIFE INSURANCE CO.

vs.

A. M. HEFNER, Mrs. A. M. HEFNER, IRA BABCOCK, & Mrs. IRA BABCOCK.

Now comes the plaintiff, by leave of court, and by way of amendment to its petition on file herein shows:

That so much of the bill of complaint in the foreclosure proceeding in said original petition referred to as is material is hereto attached and made a part hereof, marked Exhibit "A;" that a full and true copy of the subpœna in chancery served upon James Callanan in the said foreclosure suit is hereto attached and made a part hereof, marked Exhibit B; that a full and true copy of the decree in
29 said cause is hereto attached and made a part hereof, marked Exhibit C; that a full and true copy of the master's deed referred to in said original petition is hereto attached and made a part hereof, marked Exhibit D. Plaintiff further avers that it is now informed that the said defendant in the said foreclosure suit, James Callanan, claims some interest in the premises described in the original petition herein under and by virtue of a pretended tax deed.

Wherefore plaintiff prays as in and by its original petition it hath already prayed.

(Signed) NOURSE & KAUFFMAN,
Att'ys for Plaintiff.

STATE OF IOWA, } ss:
Polk County, }

I, B. F. Kauffman, on oath state that I am one of the attorneys of the plaintiff in the above-entitled cause; that I am familiar with the records and pleadings, copies of which are attached to the
30 foregoing amendment, as well as with the contents of said amendment, and that the averments of said ame-nt to the petition are true, as I very*l*y believe.

(Signed) B. F. KAUFFMAN.

Subscribed and sworn to before me by the said B. F. Kauffman this third day of May, 1884.

[SEAL.] (Signed) M. F. GUERNSEY,
Notary Public, Polk Co., Iowa.

EXHIBIT A.

In the Circuit Court of the United States, District of Iowa.

NORTHWESTERN MUTUAL LIFE INSURANCE CO.

vs.

ISAAC BATES, LUNA A. BATES; HOYT SHERMAN, Assignee of B. F. Allen, Bankrupt; John W. Ulm, James Callanan, Abram Rutt, Geo. L. Gow, —— Gow, T. R. North, E. Willard, Composing the Firm of Willard and North; F. M. Mills, J. W. Mills, & J. M. Ross, Composing the Firm of Mills & Co.; A. H. Dryden and C. A. Berry, Composing the Firm of Dryden & Berry, & Francis Pelton.

31 To the honorable circuit court in and for the district of Iowa:

Your orator, The Northwestern Mutual Life Insurance Co. of Milwaukee, Wis., a body corporate organized and existing under and by virtue of the laws of the State of Wisconsin, and doing business in Milwaukee, in said State, and a citizen of said State, humbly complaining of Isaac Bates, Luna A. Bates; Hoyt Sherman, assignee of B. F. Allen, bankrupt; C. W. Johnson, Francis Pelton, F. M. Mills, J. W. Mills, and J. M. Ross, composing the firm of Mills and Co.; A. H. Dryden & C. A. Berry, composing the firm of Dryden and Berry; T. R. North and E. Willard, composing the firm of Willard and North, each and all of whom are citizens and residents of the State of Iowa; and John W. Ulmo, who is a citizen of the State of Illinois; and James Callanan, George L. Gow, —— Gow, and Abram Rutt, each and all of whom are citizens and residents
32 of the State of Iowa, respectfully shows to the court as follows, to wit:

That heretofore, to wit, on or about the twenty-third day of August, A. D. 1870, in consideration of a loan of ten thousand dollars ($10,000.00) in money paid by your orator to the said Isaac Bates, the said Isaac Bates made, executed, and delivered to your orator his bond or writing obligatory, wherein and whereby he became bound to pay your orator, at the expiration of ten years

from the said twenty-third day of August, 1870, the just and full sum of ten thousand dollars ($10,000.00), with interest thereon until paid at the rate of ten per cent. per annum, payable semi-annually on the first day- of May and November in each and every year, both principal and interest payable at the office of the said Northwestern Mutual Life Ins. Company in the city of Milwaukee, in the State of Wisconsin.

33 That by the said bond or writing obligatory the said Isaac Bates further obligated himself to procure and deliver to the said company, at its office in Milwaukee aforesaid, duplicate receipts of the proper officers for the payment of all taxes levied or assessed upon the premises covered by the mortgage hereinafter described, executed to secure the said bond or writing obligatory; that by the said bond or writing obligatory the said Isaac Bates further bound himself in case that default should be made in the payment of any sum of money either of the said principal sum or interest thereon at the rate aforesaid or any taxes or insurance money which should become payable according to the covenants of the mortgage aforesaid, then and in such case the whole amount of said prin-

34 cipal sum shall thereupon be collectible by suit at law or by foreclosure of the said mortgage, as the said company may elect.

Your orator further shows to the court that on the said twenty-third day of August, A. D. 1870, for the purpose of securing the payment of the said sum of money agreed to be paid by the terms of the said bond or writing obligatory, with interest thereon, and for the faithful performance of all the terms and conditions of the said bond, the said Isaac Bates did, with his wife, Luna A. Bates, execute and deliver to your orator their mortgage deed wherein and whereby they conveyed to your orator the following-described premises, lying and being in the county of Dallas, in the State of Iowa, to wit: All of lots No-. three (3), five (5), six (6), seven (7), ten (10), eleven (11), twelve (12), & twenty (20), and the northwest quarter of the southwest quarter and the north half of the southwest

35 quarter of the southwest quarter of section number one (1) and lots number- one (1), eight (8), nine (9), sixteen (16), and seventeen (17), and the east half of the southeast quarter of section number two (2), and the southeast quarter of the southeast quarter of section number thirty-one (31), said sections number one (1) and two (2) being in township number seventy-eight (78), range number twenty-nine (29), and said section number thirty-one (31) being in township number seventy-nine (79), range number twenty-eight (28) west, 5th P. M., Iowa; also the following-described real estate, lying and being in Adair county, State of Iowa, viz: The southeast quarter of section number twenty-six (26), township number seventy-six (76), range number (32) thirty-two; that by the terms of said mortgage deed the said Isaac Bates and Luna A. Bates covenanted to keep the building or buildings then standing or that

36 thereafter might be erected upon the said premises insured against loss or damage by fire in some solvent incorporated insurance, company, so long as the moneys thereby secured should be

unpaid, to the amount of at least two thousand five hundred dollars ($2,500.00), and in case of failure to keep or continue such insurance; that the company, to wit, your orator, might effect an insurance to the amount aforesaid, and the premium over the expense of such insurance should be immediately paid to your orator and should, unless so paid, be added to and deemed a part and principal of the moneys secured by the said mortgage deed; and by the terms of the said mortgage the said Isaac Bates and Luna A. Bates covenanted that they had good right and lawful authority to sell and convey the said premises, and that they were the lawful and rightful owners thereof, and that they were seized of a good, perfect,
37 and indefeasible estate of inheritance therein in fee-simple, and that the said premises were free and clear from all liens and incumbrances whatsoever; and they covenanted to forever warrant and defend the same against all claims whatsoever, said mortgage deed being upon the express condition that the said Isaac Bates and Luna A. Bates would pay to your orator the just and full sum of ten thousand dollars ($10,000) on the expiration of ten years from the date thereof, with interest thereon until paid at the rate of ten per cent. per annum, payable semi-annually on the first day of May and November of each and every year, both principal and interest being payable at the office of the said company in the city of Milwaukee, Wisconsin; and, further, that they would on or about the first day of May in each and every year procure and de-
38 liver to said company, to wit, to your orator, at its office in the city of Milwaukee, Wisconsin, duplicate receipts from the proper officers for the payment of all taxes levied and assessed on said premises for the preceding year, according to the conditions of the bond hereinbefore fully described; and by the said mortgage deed they, the said Isaac Bates and Luna A. Bates further agreed—here the bill proceeds to recite that for failure to perform any of the conditions of the mortgage the whole amount of money should become due and collectible; that the mortgage was duly recorded on the 29th day of August, 1870, in Dallas county, and on the 18th day of September, 1870, in Adair county, Iowa. The bill further recites the failure to pay certain installments of interest and taxes, and that by reason thereof the full amount, both of principal and interest, had become due and collectible, and to fully recite the entire amount due thereon and also for taxes which
39 had been paid by the complainant, and that no part of any of said sums had been paid. The bill then proceeds to recite the interests of various other defendants in the suit, and referring particularly to the defendant, Jame- Callanan, avers as follows, to wit: "Your orator further avers that defendants, James Callanan, Abram Rutt, and Geo. L. Gow, claim some interest in and to a portion of said premises, the exact nature of which your orator is unable to set out;" and then proceeds to pray that each and all of the defendants hereinbefore named, including the said James Callanan, "be made parties to this bill, and that they be severally required to answer the al-egations herein, and that your orator have judgment against the said Isaac Bates for various sums of money, naming the

amount to which the bill shows the complainant is entitled,"
40 and proceeds further as follows: "Your orator further prays that it may have a decree of foreclosure against the premises hereinbefore described against all of the before-named defendants, and that the right, title, and interest of each and every of the said defendants be by decree of this court forever barred and foreclosed, and that the master in chancery of this court be authorized to make sale of said premises, or sufficient thereof to satisfy the said several sums of money, with interest thereon, and the costs of this suit, and all and singular such relief as your orator is equitably entitled to receive." The bill then proceeds to pray for a writ of subpœna against each and all of the defendants, including the said James Callanan, in accordance with the rules and practice of this court.

EXHIBIT B.

Subpœna in Chancery.

UNITED STATES OF AMERICA, } ss:
41 *Central Division, Southern District of Iowa,* }

The President of the United States to Isaac Bates, Luna A. Bates; Hoyt Sherman, assignee of B. F. Allen, bankrupt; John W. Ulm, James Callanan, C. W. Johnson, Abram Rutt, Geo. L. Gow, James M. Gow, Francis Pelton; F. R. North and E. Willard, comprising the firm of Willard and North; F. M. Mills, J. W. Mills, & J. M. Ross, comprising the firm of Mills & Co.; A. H. Dryden and C. A. Berry, composing the firm of Dryden & Berry:

We command you and each of you that you appear before the judge of the circuit court of the United States for the said district of Iowa, at Des Moines, on the first Monday of December, it being the 4th day, of December next (A. D. 1876) to answer to the bill of complaint of Northwestern Mutual Life Insurance Company this day filed in the office of the clerk of the said court, and then and there to receive and to abide by such judgment and decree as
42 shall then and thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the said district of Iowa, returnable to the December rule day, it being Monday, the fourth day of December, A. D. 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the U. S., at Des Moines, this the 31st day of October, A. D. 1876, and of the Independence the 101st year.

[SEAL.] ED. R. MASON,
Clerk U. S. C. C., District of Iowa.

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Des Moines aforesaid, on or before the day the above writ is returnable as above stated, the complainant will be taken against them as confessed, and a decree entered thereon accordingly.

[SEAL.] ED. R. MASON,
Clerk U. S. C. C., District of Iowa.

43 Isaac Bates served Nov. 3rd, 1876, at Des Moines, Iowa; Luma A. Bates served Nov. 3rd, 1876, at Des Moines, Iowa; Hoyt Sherman served Nov. 10th, 1876, at Des Moines, Iowa; James Callanan served Nov. 3rd, 1876, at Des Moines, Iowa; Abram Rut served Nov. 9th, 1876, by accepting service, at Casey, Iowa; Geo. L. Gow served November 14th, 1876, by accepting service, at Greenfield, Iowa; James M. Gow served Nov. 14th, 1876, by accepting service, at Greenfield, Iowa; Francis Pelton served Nov. 3rd, 1876, at Des Moines, Iowa; F. R. North served Nov. 6th, 1876, by accepting service, at Adel, Iowa; F. M. Mills served Nov. 3rd, 1876, at Des Moines, Iowa; J. W. Mills served Nov. 3rd, 1876, at Des Moines, Iowa; J. M. Ross served Nov. 23, 1876, at Des Moines, Iowa; A. H. Dryden served Nov. 3rd, 1876, at Des Moines, Iowa; C. A. Berry served Nov. 3rd, 1876, at Des Moines, Iowa.

This writ came into my hands for service on the 1st day of November, A. D. 1876, and I served the same on the within-named defendants, as per schedule on opposite page (John W. Ulm, C.
44 W. Johnson, E. Willard not found in district) by delivering a true copy of same to each of them.

(Signed) J. W. CHAPMAN,
U. S. Marshal.
J. S. AUKENG,
Special Deputy.

45 EXHIBIT C.

Decree.

United States Circuit Court, District of Iowa. May Term, A. D. 1877.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
ISAAC BATES, LUNA A. BATES; HOYT SHERMAN, Assignee of B. F. Allen, Bankrupt; John W. Ulm, James Callanan, C. W. Johnson, Abram Rutt, Geo. L. Gow, James M. Gow; E. R. Willard, T. R. North, Composing the Firm of Willard and North; F. M. Mills, J. W. Mills, and J. M. Ross, Composing the Firm of Mills & Co.; A. H. Dryden and G. C. Berry, Composing the Firm of Dryden & Berry, and Francis Pelton. } Eq. No. 777.

MONDAY, *May 21st*, 1877.

This cause coming on for hearing, Nourse, Kauffman & Co. appearing for complainants and Phillips, Goode and Phillips appearing for Isaac Bates, St. John & Williams and J. S. Polk ap-
46 pearing for Hoyt Sherman, assignee of B. F. Allen, bankrupt, and there having been a default against the other defendants, except John W. Ulm, def't, who was not served, and the said default being now confirmed, and the cause coming on for final hearing, it is, upon consideration, ordered, adjudged, and decreed that

there is due complaint, and that it have and recover upon the land and mortgage sued on, and on account of money paid for taxes, the sum of thirteen thousand two hundred and sixty-nine & $\frac{79}{100}$ dollars ($13,269.79), with ten per cent. interest from this date, and the further sum of seven hundred and ninety-five ($795) dollars as solicitors' fees for the foreclosure of the said mortgage and the cost of this suit, taxed — dollars.

It is further found by the court that upon the 23rd day of
47 August, 1870, the def'ts, Isaac Bates and Luna A. Bates, his wife, executed the mortgage described in complainant's bill to secure the said several sums of money, which mortgage was recorded on the 29th day of August, 1870, and is a lien upon the mortgage- premises prior and paramount to the lien of each and every of said defendants, the said mortgaged premises being described as follows: Lots number- three (3), five (5), six (6), seven (7), ten (10), eleven (11), twelve (12), and twenty (20), and the northwest quarter of the southwest quarter, and the north half of the southwest quarter of the southwest quarter of section number one (1), and lots number (1), eight (8), nine (9), sixteen (16), and seventeen (17), and the east half of the southeast quarter of section number two (2), and the southeast quarter of the southeast quarter of section number thirty-one (31), said sections numbers one (1) and two (2) being in township No. seventy-eight (78), range num-
48 ber twenty-nine (29), and said section number thirty-one (31) being in township number seventy-nine (79), range number twenty-eight (28); also the following-described real estate lying and being in Adair county, State of Iowa, vis: The southeast quarter and the south half of the northeast quarter of section number 26, township number (76) seventy-six, range number thirty-two (32).

It is further ordered, on motion of complainant, that this suit be dismissed without prejudice as to the defendants, Abram Rutt, Geo. L. Gow, and James M. Gow.

It is further adjudged and decreed that the said defendant, Isaac Bates, pay into this court on or before the first day of September, 1877, the above sums of money, with interest as above stated, and in default of such payment it is ordered that E. R. Mason be ap-
pointed special master in chancery to make sale in par-
49 cels of the mortgaged premises above described, or so much thereof as may be necessary to satisfy the said sums of money due complainant, and that he report to this court the said sale, together with a good and sufficient deed of conveyance of the premises so sold to the purchaser thereof for confirmation and approval of this court, and that the right, title, and equity of redemption of each and every of the defendants in this suit be, by a sale of the said mortgaged premises hereunder, forever barred and foreclosed, and the purchaser at such sale shall take the premises sold by title absolute, and such title shall relate back to the date of the execution of the mortgage to complainant, to wit, the 23rd day of August, A. D. 1870. It is further decreed that Hoyt Sherman, assignee, have leave to file cross-bill therein upon the matter set up in

50 his answer herein against Isaac Bates and wife, and that the surplus arising from the sale of the above-described property under this decree in favor of complainant, if any, be brought into this court to await the determination of the amount due said Hoyt Sherman, assignee, his lien upon said premises being second and junior to the lien of complainants. It is further ordered that as to the defendants, Jno. W. Ulm and C. W. Johnson, who were not served with process, as well as for further proceedings and for order respecting the receiver herein, this cause shall stand continued.

(S'g'd) SAM. F. MILLER, *Judge.*

Filed May 21st, 1877.

51 EXHIBIT D.

Master's Deed.

This indenture, made the 5th day of October, in the year of our Lord 1877, between Ed. R. Mason, master in chancery of the United States circuit court within and for the district of Iowa, dwelling in the city of Des Moines, in said district, of the first part, and the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, of the second part, witnesseth:

Whereas, at a term of the United States circuit court for the district of Iowa, begun and held at the city of Des Moines, in said district, on the 21st day of May, 1877, it was, among other things, ordered, adjudged, and decreed by the said court in a certain cause then depending in the said court between the Northwestern Mutual Life Insurance Company, complainant, and Isaac Bates, Luna

52 A. Bates; Hoyt Sherman, assignee of B. F. Allen, bankrupt; John W. Ulm, James Callanan, C. W. Johnson, Abram Rutt, Geo. L. Gow, James M. Gow, E. R. Willard, F. R. North, F. M. Mills, J. W. Mills, J. M. Ross, A. H. Dryden, G. E. Berry, and Francis Pelton, defendants, that the mortgaged premises mentioned and set forth in complainant's bill and the decree of said court, and hereinafter particularly described, be sold by or under the directions of E. R. Mason, one of the masters of said court, the said master first giving such notice of the time and place of such sale as is required by the statutes of the State of Iowa for the sale of property under execution; and whereas the said Ed. R. Mason, master in chancery aforesaid and party of the first part to these presents, in pursuance of the said order and decree of said court, did, on the day of the date of

53 these presence sell at public auction at the front door of the United States court-house, in the city of Des Moines, in the said district of Iowa, the said mortgaged premises hereinafter particularly described, having first given due notice of the time and place of such sale as is required by the said order and decree of said court, at which sale the said mortgaged premises, hereinafter particularly described, were struck off to the said party of the second part for the sum of ten thousand six hundred dollars, that being the highest sum bidden for the same.

Now, therefore, this indenture witnesseth: That Ed. R. Mason, mas-

ter in chancery as aforesaid and party of the first part to these presents, in order to carry into effect the said sale so made as aforesaid in pursuance of the said decree of the said court, and in
54 the consideration of the said sum of ten thousand six hundred dollars, paid at the time of the execution hereof by the said party of the second part to these presents, the receipt whereof he doth hereby acknowledge, hath granted, bargained, and sold, aliened, released, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, alien, release, convey, and confirm, unto the said party of the second part and to its heirs and assigns forever all of lots number- three (3), five (5), six (6), seven (7), ten (10), eleven (11), twelve (12), and twenty (20), and the northwest quarter of the southwest quarter and the north half of the southwest quarter of the southwest quarter of section number one (1), and lots number- one (1), eight (8), nine (9), sixteen (16), and seventeen (17), and the east half of the southeast quarter of section number two (2), and the southeast quarter of the south-
55 east quarter of section number thirty-one (31), said sections number one (1) and two (2) being in township number seventy-eight (78), range number twenty-nine (29), and said section number thirty-one (31) being in township No. seventy-nine (79), range number twenty-eight (28) west, 5th P. M., Iowa; also the following-described real estate, lying and being in Adair county, State of Iowa, viz: The southeast quarter of section number twenty-six (26), township number seventy-six (76), range number thirty-two (32), together with all and singular the rights, members, privileges, hereditaments, and appurtenances to the same belonging or in any way appertaining; to have and to hold all and singular the said premises above mentioned and described and hereby granted and conveyed or intended so to be appurtenances unto the
56 said party of the second part, its heirs and assigns, to the only proper use, benefit, and behoof of the said party of the second —, its heirs and assigns, forever.

In witness whereof the said Ed. R. Mason, master in chancery as aforesaid, hath hereunto set his hand the day and year first above written.

[Seal U. S. Cir. C't.]

(Signed) EDW. R. MASON,
Master in Chancery of the United States Circuit Court for the District of Iowa.

UNITED STATES OF AMERICA, } *ss:*
District of Iowa, }

On this eighth day of October, 1877, before me, Wm. A. Park, a notary public in and for Polk county, State of Iowa, personally appeared Ed. R. Mason, master in chancery of the United States circuit court for the district of Iowa, who is personally known to me to be the identical person who signed the foregoing deed as grantor, and acknowledged the same to be his voluntary act and deed for the purposes therein specified.

Witness my hand and seal the day and year first above written.
[NOTARY'S SEAL.] (Signed) WM. A. PARK,
Notary Public, Polk Co., Iowa.

57 Endorsed: In the United States circuit court, southern district of Iowa, central division. Northwestern Mutual Life Insurance Company *vs.* Adam Hefner *et al.* Amendment to petition. Filed May 3rd, 1884. Ed. R. Mason, clerk. Nourse & Kauffman, att'ys for pl'ffs.

58 And on the 8th day of May, 1884, the defendants, by their attorneys, filed in said cause an answer to the petition and amendment thereto in the words and figures following, to wit:

59 *Answer.*

Circuit Court of the United States in and for the Southern District of Iowa, Central Division.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
A. M. HEFNER, Mrs. A. M. HEFNER, his Wife, IRA BABCOCK & Mrs. IRA BABCOCK, his Wife.

Come now the defendants, and for answer to the petition of plaintiff and the amendment thereto say—

First. That it is true, as in the petition alleged, that plaintiff is a corporation, as therein alleged, and that the citizenship of the parties plaintiff and defendant herein is as therein alleged.

Second. That the said real estate in the petition described and for the possession of which this action is being prosecuted, being subject to taxation for the year eighteen hundred and seventy, the taxes assessed thereon for that year remained due, unpaid, and
60 delinquent on the 15th day of November, A. D. 1871, and, being so unpaid and delinquent, the treasurer of Adair county, Iowa, on the day and year last aforesaid, at an adjourned sale of a tax sale duly begun and publicly held on the first Monday of November, 1871, duly and in all respects, in conformity with the statutes in such case made and provided, sold said real estate to one Jame- Callanan, and pursuant to said sale, there being no redemption therefrom, on the first day of December, 1874, executed to said Callanan a tax deed therefor, a copy of which is hereto attached, marked Exhibit A, and made part hereof, and which tax deed was duly filed for record and on the third day of December, 1874, recorded in book 16, pages 627–'9, of the record of deeds of said Adair county; that these defendants, by purchase and conveyance from said Callanan, have since the day and year last aforesaid succeeded to and are now the owners of all
61 of the right, title, and interest acquired by said Callanan by and through said tax sale and deed to and in said real estate, and that at the time of the commencement of said foreclosure suit in the petition mentioned and at the date of said decree therein,

also in said petition mentioned, said Callanan was the owner of whatever right and title was created or conferred by said tax sale and deed, and made no other claim of right to or interest in said real estate than as the owner thereof by title derived from said tax sale and deed, which right, interest, and title he then claimed was paramount to any title through which plaintiff claims; wherefore defendants say that the claim of said Callanan of right, title, and interest in and to said real estate was wholly irrelevant to the subject-matter and purpose of said foreclosure suit, and was not covered or in anywise affected by said decree or the sale and conveyance by said master.

62 Third. Further answering, defendants say that said Callanan was not served with process for his appearance in said foreclosure suit; that he did not appear thereto or therein, and that therefore neither the said Callanan nor these defendants claiming through and under him are bound or in anywise affected by said decree or master's sale and conveyance.

Fourth. And, further answering, defendants say that said decree and all proceedings thereunder were and are void as against the said Callanan and themselves as claimants through and under him, because, as they aver the truth to be, there was no default or order for the entry of a decree *pro confesso* upon or pursuant to which said decree was rendered, and without which said court had no right, authority, or power to render said decree.

(Signed) BARCROFT & GATCH,
Sol'rs for D'f'ts.

63 EXHIBIT A.

Tax Deed. Filed Dec. 3, '74. R. O. Brown, Recorder.

Treasurer Adair Co., Iowa, to James Callanan, Jr.

Know all men by these presents that whereas the following-described pieces of real property situated in the county of Adair and State of Iowa, viz: The southeast quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa; the northeast quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa; the northwest quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa; the southwest quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa; the southeast quarter of the southwest quarter of section sixteen, in township seventy-six (76) north, of range (33) thirty-three west, 5th P. M., Iowa; the
64 southwest quarter of the southwest quarter of section sixteen (16), in township seventy-six (76) north, of range thirty-three (33) west, 5th P. M., Iowa, were each subject to taxation for the year A. D. 1870; and whereas the taxes assessed on said respective pieces of real property for the year aforesaid remained due and unpaid at

the date of the sale hereinafter named; and whereas the treasurer of said county did, on the 15th day of November, A. D. 1871, by virtue of the authority in him vested by law, at an adjourned sale of the sale begun and publicly held on the first Monday of November, A. D. 1871, expose to public sale at the court-house in the county aforesaid, in substantial conformity with all the requirements of the statute in such case made and provided, the several pieces of real property above and hereinafter described, separately, for the payment of the taxes, interest, and costs then due and remaining
65 unpaid on each of said pieces of real property, respectively; and whereas, at the time and place aforesaid, James Callanan, Jr., of the county of Polk and State of Iowa, having offered to pay the sum of eight dollars and seventy-seven (77) cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on the southeast quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa., for the whole of the last above-described tract of land, which was the least quantity bid for; and

Whereas, at the time and place aforesaid, the said James Callanan, Jr., having offered to pay the sum of eight (8) dollars and seventy-seven (77) cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on the northeast quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa, for
66 the whole of the last above-described tract of land, which was the least quantity bid for; and

Whereas, at the time and place aforesaid, the said James Callanan, Jr., having offered to pay the sum of eight (8) dollars and seventy-seven (77) cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on the northwest quarter of the southeast quarter of section twenty-six (26), in township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa, for the whole of the last above-described tract of land, which was the least quantity bid for; and

Whereas, at the time and place aforesaid, the said James Callanan, Jr., having offered to pay the sum of eight (8) dollars and seventy-seven (77) cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on the southwest quarter of the southeast quarter of section twenty-six (26), in township
67 seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa, for the whole of the last above-described tract of land, which was the least quantity bid for; and

Whereas, at the time and place aforesaid, the said James Callanan, Jr., having offered to pay the sums of six (6) dollars and seventeen (17) cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on the southeast quarter of the southwest quarter of section sixteen (16), in township seventy-six (76) north, of range thirty-three (33) west, 5th P. M., Iowa, for the whole of the last above-described tract of land, which was the least quantity bid for; and

Whereas, at the time and place aforesaid, the said James Calla-

nan, Jr., having offered to pay the sum of six (6) dollars and seventeen (17) cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on the southwest quarter of
68 the southwest quarter of section sixteen (16), in township seventy-six (76) north, of range thirty-three (33) west, 5th P. M., Iowa, for the whole of the last above-described tract of land, which was the least quantity bid for, and payment of the said several sums of money having been by him made to the said treasurer, the said respective pieces of property were, respectively, stricken off to him at the respective prices aforesaid; and

Whereas three years have elapsed since the date of said sale and the said respective pieces of property have not been redeemed therefrom, as provided by law, nor either of them nor any part thereof;

Now, therefore, I, L. J. Gray, treasurer of the county aforesaid, for and in consideration of the said several sums of money to the treasurer paid as aforesaid and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and
69 by these presents do grant, bargain, and sell, unto the said James Callanan, Jr., his heirs and assigns, the several pieces of real property which were stricken off to him at the said sale hereinbefore described; to have and to hold unto him, the said James Callanan, Jr., his heirs and assigns, forever, subject, however, to all the rights of redemption provided by law.

In witness whereof I, L. J. Gray, treasurer as aforesaid, by virtue of authority as aforesaid, have hereunto subscribed my name on this first day of December, A. D. 1874.

L. J. GRAY, *Treasurer.*

STATE OF IOWA, } *ss:*
Adair County, }

I hereby certify that before me, W. M. Rogers, a notary public in and for said county, personally appeared the above-named L. J. Gray, treasurer of said county, personally known to me to be the
70 treasurer of said county at the date of the execution of the above conveyance and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county, and who acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county for the purposes therein expressed.

Given under my hand and seal this first day of December, A. D. 1874.

[SEAL.]

W. M. ROGERS,
Notary Public.

STATE OF IOWA, } *ss:*
Adair County, }

I, E. S. Chenoweth, recorder of Adair county, Iowa, hereby certify that the above tax deed is a true and correct copy of the original, as appears by the records in my office, recorded in book 16, pages 627, 628, & 629, on 3rd of December, 1874, at 9 a. m.

Dated this 25th day of October, A. D. 1883.

E. S. CHENOWETH,
Recorder Adair Co., Iowa.

71 Endorsed: United States circuit court. N. W. Mutual Life Ins. Co. *vs.* A. M. Hefner *et al.* Answer to petition and amendment to same. Filed May 8th, 1884. Ed. R. Mason, clerk. J. R. Barcroft & C. H. Gatch, att'ys for def'ts.

72 And on the 12th day of May, 1884, the plaintiff, by Nourse & Kauffman, its attorneys, filed in said cause a demurrer to the answer of defendants in the words and figures following, to wit:

73 *Demurrer.*

United States Circuit Court, Southern District of Iowa, Central Division.

NORTHWESTERN MUTUAL LIFE INSURANCE CO.

vs.

A. M. HEFNER, Mrs. A. M. HEFNER, IRA BABCOCK, Mrs. IRA BABCOCK.

The plaintiff demurs to the second count of defendants' answer herein for the following causes, to wit:

First. The facts alleged in said count of the said answer do not constitute any defense, for that, notwithstanding the existence of the said facts, the rights of the said James Callanan were fully barred and foreclosed and cut off by the said proceedings in foreclosure set up in the plaintiff's amendment to its petition.

Second. Nothing in the said count set out is stated that in law would avoid the effect of the said foreclosure decree as a fore-
74 closure of the right and interest of the said James Callanan in and to the said real estate in a collateral proceeding.

Third. The said count of the said answer admits the foreclosure proceedings set up in the plaintiff's amendment to its petition, and there is no fact set up therein that avoids the effect thereof in this collateral proceeding.

And the plaintiff demurs to the fourth count of the said answer for the reason that the effect of the said decree is in nowise avoided in a collateral proceeding such as this by the alleged failure to enter the default against the said Callanan as therein alleged.

Second. The said decree in the said foreclosure proceeding is effective and binding as against the said defendant in this proceeding, notwithstanding no default may have been formally entered
75 at the rules against him, the decree in fact confirming the default against him and being conclusive in that respect.

Third. The failure to enter such a default does not affect the validity of such a decree.

(Signed) NOURSE & KAUFFMAN,
Att'ys for Pl'ff.

Endorsed: U. S. circuit court, southern district of Iowa, central division. Northwestern Mutual Life Insurance Company *vs.* Hefner *et al.* Demurrer to the second and fourth count of the answer. Filed May 12th, 1884. Ed. R. Mason, clerk. Nourse & Kauffman, att'ys for pl'ffs.

76 And on the 19th day of May, 1884, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

77 United States Circuit Court, Southern District of Iowa. May Term, 1884.

NORTHWESTERN MUTUAL LIFE INSURANCE CO.
vs.
A. M. HEFNER *et al.* } No. 3079. Law.

MONDAY, *May 19th*, 1884.

This cause came on this day for hearing on plaintiff's demurrer to defendants' answer. Plaintiff appears by Nourse and Kauffman and defendants by C. H. Gatch, and after argument of counsel thereon the said demurrer was submitted to the court.

78 And on the 26th day of May, 1884, in the record of the proceedings of said court is an judgment entry and certificate of division of opinion in said cause in the words and figures following, to wit:

79 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1884.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
vs.
A. M HEFNER, MRS. A. M. HEFNER, IRA BABCOCK, MRS. IRA BABCOCK. } No. 3079. Law.

MONDAY, *May 26th*, 1884.

This cause having been heretofore submitted to the court upon the plaintiff's demurrer to the second and fourth counts of defendants' answer, plaintiff appears by Nourse and Kauffman, and defendants by C. H. Gatch. The defendant- having by leave of the court withdrawn the first and third counts contained in the answer herein, and the court, being fully advised in the premises, ordered that said demurrer to second and fourth counts of the answer be sustained; and the defendants electing to stand on said answer and refusing to further plead, the court finds for the plaintiff. It is, therefore, considered, ordered, and adjudged that the plaintiff is

80 the owner and entitled to the immediate possession of the premises described in the petition herein and described as follows, to wit: The southeast quarter of section twenty-six (26), township seventy-six (76) north, of range thirty-two (32) west, 5th P. M., Iowa, and that a writ of possession issue under the seal of this court to put the plaintiff in possession of said premises.

It is further ordered and adjudged that plaintiff do have and recover of and from the defendants, A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, and Mrs. Ira Babcock, the costs herein, taxed at $—, and that execution issue therefor; to all of which the defendant- at the time duly excepted.

It is further ordered that the writ of possession to be issued herein be suspended during the pendency of the appeal to the Supreme Court of the United States upon defendants filing a bond herein, to be approved by one of the judges of this court.

81 And the judges, upon the trial of said cause, being opposed in opinion upon certain questions arising therein, it was ordered that said questions be entered of record and certified to the Supreme Court of the United States for its decision thereon.

Certificate of Decision of Opinion.

In United States Circuit Court in and for the Southern District of Iowa, Central Division. May Term, 1884.

NORTHWESTERN MUTUAL LIFE INSURANCE CO.
vs.
A. M. HEFNER *et al.* } At Law.

The plaintiff in the above cause filed its petition at law against A. M. Hefner and wife and Ira Babcock and wife, claiming as against said defendants the immediate possession of certain realty situated in Iowa and of which plaintiff claimed to be the owner in fee, deducing its title through a master's deed executed in pursuance of a sale made of the realty under a decree rendered in a foreclosure

82 suit formerly brought upon the equity side of this court. It was shown upon the record that on the 23rd day of August, 1870, one Isaac Bates, then the owner of the realty in question, executed a mortgage thereon to complainant to secure the payment of $10,000.00, then and there loaned to said Bates. The loan remaining unpaid in December, 1876, the mortgagee (plaintiff herein) filed its bill for foreclosure, as stated, making Isaac Bates and wife and others, including James Callanan, parties defendant. As to James Callanan the allegations of the bill are as follows: "Your orator further avers that defendants, James Callanan, Abram Rutt, and Geo. L. Gow, claim some interest in and to a portion of said premises, the exact nature of which your orator is unable to set out." The bill prays that the several defendants be required to answer the allegations therein made, and further prays proper relief against Isaac Bates, and then prays as follows: "Your orator further

83 prays that it may have a decree of foreclosure against the premises hereinbefore described against all of the beforenamed defendants, and that the right, title, and interest of each and every of said defendants be, by decree of this court, forever barred and foreclosed," &c. Service of subpœna was duly had upon the defendants, including James Callanan. The latter def't, Callanan, did not appear or answer, and default was entered against him. At the May term, 1877, a decree of foreclosure was entered in the cause providing for a sale by the master, and decreeing "that the right, title, and equity of redemption of each and every of the defendants in this suit be, by a sale of said mortgaged premises hereunder, forever barred and foreclosed, and the purchaser at such sale shall take the premises

sold by title absolute, and such title shall relate back to the date of the execution of the mortgage to complainant, to wit,
84 the 23rd day of August, 1870." At the sale under this decree the plaintiff herein bought the premises, and sale being confirmed a master's deed thereof was executed and delivered to plaintiff. The present action was brought to recover possession of the realty thus conveyed from the present defendants. The defendants Hefner and Babcock answered the petition, averring that they were in possession of the realty in question under deeds of conveyance from James Callanan; that Callanan derived title thereto from a sale for delinquent taxes made by the treasurer of Adair county, Iowa, in which the realty is situated, said sale being for the unpaid taxes of 1870, the sale being made November 15th, 1871, and the deed to Callanan being made and delivered December 1st, 1874; that the only claim, title, or interest which Callanan had in said realty was derived from the tax sale and deed; that he never had or
85 claimed any lien on said realty which was either inferior or superior to the lien of the mortgage to plaintiff, but his sole interest was that of owner of the realty absolutely under the treasurer's deed; that in the foreclosure suit the question of adverse titles was not involved, and could not be investigated, that being a question wholly irrelevant to the subject-matter and purpose of the foreclosure proceedings, and that the title of said Callanan was not affected by the decree entered upon default. To this answer plaintiff demurred, and the demurrer being sustained in accordance with the opinion of the presiding judge, the defendants stood by their answer, and final judgment was thereupon entered in favor of plaintiff.

Be it remembered that we the undersigned, judges holding the United States circuit court in and for southern district of Iowa, central division, at the May term, 1884, under the act of Congress
86 approved July 20th, 1882, do hereby certify that upon the hearing of the demurrer to the answer in the foregoing cause the judges were divided in opinion and were unable to agree upon the following questions of law arising upon said demurrer and necessary to be determined in order to dispose of said demurrer, to wit: 1st. Did the decree entered by default against James Callanan in the foreclosure proceedings have the effect of adjudicating the question of title on part of Callanan and debar him and his grantees from asserting his adverse title as a defense in the present action? 2nd. Did the court in the foreclosure proceedings under the allegations of the bill have jurisdiction of the question of adverse title so that its decree upon a default will defeat the assertion of such a title on part of one of the defendants or his grantees? 3rd. As the decree in terms purports to bar all the right, title, and equity of redemption of
87 def'ts, including Callanan, is it or not binding upon him and his grantees, even though erroneous, so that it cannot be attacked in a collateral proceeding? 4th. If the court in the foreclosure proceedings could not properly hear and determine questions of adverse title, must not the decree being by default be limited in its effects solely to such matters as were properly cognizable by the court

in the foreclosure proceedings and be so construed as to bar all claim upon the part of Callanan to a lien upon the realty, but leaving the question of adverse title to the mortgagor and mortgagee untouched? And we do further certify that the points of disagreement above set forth were by our direction duly stated and ordered to be entered of record, together with the foregoing statement of facts upon which the same arose, all being done this May term, 1884, of said court.

(Signed) J. M. LOVE,
Judge Southern District of Iowa.

(Signed) O. P. SHIRAS,
Judge Northern District of Iowa.

88 And on the 20th day of September, 1884, a bond on writ of error was filed in said court in the words and figures following, to wit:

89 Know all men by these presents that we, A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, and Mrs. Ira Babcock, principals, and James Callanan as surety, are held and firmly bound to the Northwestern Mutual Life Insurance Company in the sum of fifteen hundred dollars, to be paid to the said company, its successors or assigns; of which payment, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, by these presents.

Signed with our hands and dated this 8th day of September, A. D. 1884.

Whereas at a term of the circuit court of the United States, 8th circuit, southern district of Iowa, central division, in a suit depending in said court between The Northwestern Mutual Life Insur-
90 ance Company, complainant, and A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, and Mrs. Ira Babcock, defendants, judgment was rendered against the said defendants, and the said A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, and Mrs. Ira Babcock having, on a certificate of division by the judges, appealed to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Northwestern Mutual Life Insurance Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, and Mrs. Ira
91 Babcock shall prosecute their said appeal to effect and answer all costs and damages, including rents and profits, if *he* shall fail to make good *his* appeal, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

(Signed) A. M. HEFNER,
MRS. A. F. HEFNER,
IRA BABCOCK, &
MRS. IRA BABCOCK,
By C. H. GATCH,
Their Atty'.

(Signed) J. CALLANAN.

Approved Sept. 11, 1884.

(S'g'd) J. M. LOVE, *Judge.*

(Endorsed :) U. S. circuit court. N. W. Mutual Life Ins. Co. *vs.* A. M. Hefner *et al.* Bond for appeal. Filed Sept. 20, 1884. Ed. R. Mason, clerk.

92 And on the 20th day of September, 1884, an original writ of error was filed in said cause in the words & figures following, to wit:

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Northwestern Mutual Life Insurance Co. and A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, & Mrs. Ira Babcock, a manifest error hath happened, to the great damage of the said A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, & Mrs. Ira Babcock, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 20th day of September, A. D. 1884.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. C. C., S. Dist. of Iowa

[Endorsed:] Northwestern Mutual Life Insurance Co. *vs.* A. M. Hefner *et al.* Writ of error. Filed Sep. 20, 1884. Ed. R. Mason, clerk.

94 And on the 20th day of September, 1884, an original citation was filed in said cause in the words and figures following, to wit:

95 UNITED STATES OF AMERICA, *ss:*

To the Northwestern Mutual Life Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, A. D. 1884, pursuant to a certificate of division filed in the clerk's office of the circuit court of the United States for the 8th circuit and for the southern district of Iowa, central division, wherein A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, & Mrs. Ira Babcock are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said certificate of division mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. M. Love, — of the circuit court of the United States, 8th circuit, district of Iowa, this 12th day of September, A. D. 1884.

J. M. LOVE, *Judge.*

Service of the within citation acknowledged this 15th day of September, 1884.

NOURSE & KAUFFMAN,
Attorneys for N. W. M. L. Ins. Co.

[Endorsed:] U. S. circuit court. N. W. Mutual Life Ins. Co. *vs.* A. M. Hefner *et al.* Citation. Filed Sep. 20, 1884. Ed. R. Mason, clerk.

96 United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause adjudicated in said court, wherein The Northwestern Mutual Life Insurance Company was plaintiff and A. M. Hefner *et al.* were defendants—as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error and the original citation, with return of service thereon, are hereto attached and herewith returned with this transcript.

In testimony whereof I hereunto subscribe my name and affix the seal of the said court, at my office, in the city of Des Moines, in said district, this 22nd day of September, A. D. 1884.

[Seal U. S. Circuit Court, Southern District Iowa.]

E. R. MASON,
Clerk U. S. Circuit Court, Southern Dist. of Iowa.

Endorsed on cover: S. Iowa C. C. U. S. No. 329. A. M. Hefner, Mrs. A. M. Hefner, Ira Babcock, & Mrs. Ira Babcock, plaintiffs in error, *vs.* The Northwestern Mutual Life Insurance Company. Filed 29th September, 1884.

123-147.

FILED
SEP 6 1887
JAMES. H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 57

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF IOWA.

A. M. HEFNER, MRS. A. M. HEFNER, IRA BABCOCK, MRS. IRA BABCOCK, PLAINTIFFS IN ERROR.

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFFS IN ERROR

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFFS IN ERROR.
NOURSE & KAUFFMAN, FOR DEFENDANT IN ERROR.

DES MOINES:
P. C. KENYON, LAW AND COMMERCIAL PRINTER.
1887.

123-747
123-747.

Office Supreme Court U. S.
FILED.
SEP 6 1887
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

No. 54

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF IOWA.

A. M. HEFNER, MRS. A. M. HEFNER, IRA BABCOCK, MRS. IRA BABCOCK, PLAINTIFFS IN ERROR.

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFFS IN ERROR

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFFS IN ERROR.
NOURSE & KAUFFMAN, FOR DEFENDANT IN ERROR.

DES MOINES:
P. C. KENYON, LAW AND COMMERCIAL PRINTER.
1887.

IN THE

Supreme Court of the United States.

No. 329.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF IOWA.

H. M. HEFNER, ET. AL.,
Ptaintiffs in Error,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error.

C. H. GATCH AND WM. CONNER, *for Plaintiffs in Error.*
NOURSE & KAUFMAN, *for Defendant in Error.*

ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

On the 5th day of July, 1883, the Northwestern Mutual Life Insurance Company commenced an action in the circuit court of the United States, southern district of Iowa, central division, against A. M. Heffner, *et al.*, plaintiffs in error herein, to recover the land in controversy, basing their right to recover upon the title derived through the foreclosure of a mortgage by proceedings in said court, which are set out as exhibits (folios 31–57) to the petition filed by the company.

It is alleged that one Isaac Bates, was, on the 23d day of

August, 1870, the absolute owner in fee of the property. That on that day he executed a mortgage on it to said company to secure various sums of money, as stated therein. That on his failure to pay the mortgage debt, the company, on the 31st of October, 1876, filed its bill in said court to foreclose said mortgage against the mortgagor, and other parties, including James Callanan, who is made a party upon the following allegation:

> Your orator further avers that defendants, James Callanan, Abram Rutt and Geo. L. Gow, claim some interest in and to a portion of said premises, the exact nature of which your orator is unable to set out.

The prayer of the bill was for judgment against said Isaac Bates for the money due upon the mortgage debt, and for "a decree of *foreclosure against the peremises* hereinbefore described against all of the before named defendants, and that the right, title and interest of each and every of said defendants be, by decree of this court, forever barred and foreclosed, and that the master in chancery of this court be authorized to make a sale of said premises or sufficient thereof to satisfy the said several sums of money with interest thereon," etc.

The subpœna in chancery issued in said cause was duly served on said Callanan. He did not appear, but his default was not entered as required by the rules of the court.

The cause coming on to be heard on the 21st of May, 1877, a decree was entered reciting and decreeing "that there having been a default against other defendants (including Callanan), * * * and the said default being now confirmed, * * * it is, upon consideration, ordered adjudged and decreed that there is due complainant, and that it have and recover upon the land and mortgage sued on, * * * $13,269.79, with ten per cent interest," etc; finding "that the mortgage in suit is a lien upon the mortgaged premises prior and paramount to the *lien* of each and every of said defendants;" and further adjudging and decreeing "that the said defendant, Isaac Bates, pay into this court, on or before the 1st day of September, 1887, the above sums of money, with interest,

as above stated; and in default of such payment, that E. R. Mason be appointed special master in chancery to make sale * * * and that the right, title and equity of redemption of each and every of the defendants in this suit be, by a sale of the said mortgaged premises hereunder, forever barred and foreclosed, and the purchaser at such sale shall take the premises sold by absolute title."

The master sold and executed a deed of conveyance of the premises to the company on the 5th of October, 1877.

On the 8th day of May, 1884, the defendants—plaintiffs in error—filed an answer (59–62) to the petition in the present action, setting out in the second count thereof that the lands in controversy were, on the 15th day of November, A. D. 1871, duly sold for delinquent taxes for the year 1870 to the defendant James Callanan; and that there being no redemption from the sale, the treasurer of the proper county executed a deed of conveyance to Callanan of the property, in pursuance of the sale, on the 1st of December, 1874; and that Callanan had conveyed by proper deed the property to defendants, who were then the owners and in possession thereof, attaching as an exhibit (63–9) a copy of the treasurer's deed. And in the fourth count alleging that there was no default or order for the entry of a decree *pro confesso*, upon or pursuant to which the decree was rendered, and without which the court had no right, authority or power to render the decree.

The first and third counts of the answer were withdrawn.

The plaintiff demurred (73–5) to the second count, upon the ground that the *rights* of Callanan were fully barred and foreclosed and cut off by the proceedings in foreclosure set up in the plaintiff's petition and amendment.

And to the fourth count, that the failure to enter default, as alleged, did not affect the validity of the decree.

On the 26th day of May, 1884, the cause having been submitted to the court on the demurrer to said second and fourth counts of defendant's answer, it was by the court ordered that

the demurrer be sustained to both counts (79–81). The defendants elected to stand upon their answer. The court entered judgment in favor of plaintiff for the possession of the property and for costs, to which the defendants excepted. "And the judges upon the trial of said cause being opposed in opinion upon certain questions arising therein, it was ordered that said questions be entered of record, and certified to the supreme court of the United States for its decision thereon."

The questions entered of record and certified are as follows (86–71):

"*First.* Did the decree, entered by default against James Callanan in the foreclosure proceedings, have the effect of adjudicating the question of title on the part of Callanan, and debar him and his grantees from asserting his adverse title as a defense in the present action?

"*Second.* Did the court, in the foreclosure proceedings, under the allegations of the bill, have jurisdiction of the question of adverse title, so that its decree upon a default will defeat the assertion of such a title on the part of one of the defendants, or his grantees?

"*Third.* As the decree in terms purports to bar all the right, title and equity of redemption of defendants, including Callanan, is it or not binding upon him and his grantees, even though erroneous, so that it cannot be attacked in a collateral proceeding?

"*Fourth.* If the court in the foreclosure proceedings could not properly hear and determine questions of adverse title, must not the decree being by default be limited in its effects solely to such matters as were properly cognizable by the court in the foreclosure proceedings, and be so construed as to bar all claim upon the part of Callanan to a lien upon the realty, but leaving the question of the adverse title to the mortgagor and mortgagee untouched."

ASSIGNMENT OF ERRORS.

And plaintiffs in error say there is manifest error in the record in this—

1. That the court erred in sustaining the demurrer to the second count of the defendant's answer to said petition.

2. That the court erred in holding that the decree entered by default against James Callanan in the foreclosure proceedings had the effect of adjudicating the question of title on the part of Callanan and to debar him and his grantees from asserting his adverse title as a defense to the present action.

3. The court erred in holding that under the allegations of the bill in the foreclosure proceedings the court had jurisdiction of the question of adverse title, and that its decree upon default could defeat the assertion of such a title on the part of the defendant Callanan or his grantees.

4. The court erred in holding that the decree in terms purports to bar all the right and title of Callanan, and in holding that it could not be attacked in a collateral proceeding.

5. The court erred in holding that the decree being by default, was not limited in its effects to such matters as were properly cognizable in a court of equity in foreclosure proceedings, and that it did not leave the question of title adverse to the mortgagor and mortgagee untouched.

6. The court erred in holding that the defendant Callanan was, under the allegations of the bill, a party to the action for any purpose.

7. The court erred in holding that there was anything alleged in the bill which Callanan was required to answer, or which taken as confessed authorized the court to exercise any jurisdiction over the title held by him adverse to the title of the mortgagor whose title only was sought to be barred by the foreclosure proceeding.

8. The court erred in holding that the title of Callanan to the property, which could not have been tried in said action by proper averments in the petition and answer, putting the same

in issue, was, without any allegation in the bill in relation to it, so far involved as to authorize a decree upon default barring and foreclosing it.

9. The court erred in holding that a court of equity in a suit to foreclose a mortgage has jurisdiction upon default, of a defendant, not a party to the mortgage, nor bound by it, to render a decree adjudicating the question of his title to the property.

10. That the court erred in holding that the court in the foreclosure suit could, by decree, bar the title to the property of any party to the suit not a party to the mortgage or bound by it.

ARGUMENT.

There is no question made in the record as to the validity of Callanan's title to the property at the time of the commencement of the proceedings to foreclose the mortgage under which plaintiff claims title to the property in controversy.

There is no claim that his title was through or under or subject in any manner to the title of the mortgagor or to the lien of the mortgage On the contrary, being a tax title, under the provisions of the Iowa statutes, it was not a "derivitive one" but "a new and independent title, derived from the sovereign power under which the tax is levied, paramount to all previous interests, and freed from all incumbrances."

Crum vs. Cotting, 22 Iowa, 411.

It is not claimed that in the suit by the mortgagee to foreclose the mortgage Callanan could have been made by allegations in the bill or upon his own application a party to the suit for the purpose of adjudicating his title, selling it under a decree to be rendered in the case, or barring it without sale.

The claim is: that without regard to what the court might have properly done, the defendant is bound by what it did do, and that it did render such a decree; that the decree is simply erroneous and not liable to collateral attack.

It may be conceded that a party to a suit is barred or estopped by the judgment or decree rendered in it upon any question that was or that might have been tried and adjudicated in it.

The purposes of a suit to foreclose a mortgage in default of the payment of the mortgage debt, are to sell the title of the mortgagor to the property, so far as it is covered by the mortgage, and to cut off the equity of redemption of all persons made parties to the bill who hold any right, title, lien or interest in the property under the mortgagor, junior or inferior, or subject to the mortgage.

*The only proper object of the suit is to bar the mortgagors and those claiming under them. * * * A claim under a tax title is one which cannot be considered in a foreclosure suit unless it affects the equity of redemption.* 2d Jones on Mortgages, Sec. 1445. In note 2 to same section, *Pelton vs. Farmin*, 18 Wis., 222; *Palmer vs. Yager*, 20 Wis., 91; *Summers vs. Bromley*, 28 Mich, are cited, and the following extract is quoted from the opinion in the last named case.

A court of equity is not the appropriate tribunal, nor is a foreclosure suit a suitable proceeding for the trial of claims to the legal title which are hostile and paramount to the interests and rights and titles of both mortgagor and mortgagee. Such a trial will neither fall in with the nature of the jurisdiction or the genius or frame of the particular remedy.

The effect of the decree for the sale is necessarily limited to the mortgagor's interest in the property, and within that to the interest conveyed by the terms of the mortgage.

It is wholly immaterial to any question that can arise between any proper parties to such an action, or to any decree that can be rendered in it, whether there is a valid adverse title to that of the mortgagor, or any interest in it not subject to the mortgage.

It is not competent for any purpose, in such a suit, to try the validity of a title claimed adversely to that or the mortgagor. An issue involving it could only be made in a court of law. It would necessarily be between the persons claiming the adverse legal titles. The mortgagee has only a lien on the title of the mortgagor if he has one; has nothing if the mort-

gagor's title entirely fails. Simply as a lienholder, he could have no standing in either a court of law or equity in an action or suit to try the question of title between the adverse claimants—not in a court of law, because he has not the legal title; and not in equity, because the issue is one cognizable solely in a court of law.

Callanan's title could not by any allegation proper to be made in the bill to foreclose have been brought within the judicial power of the court. So far as the proceeding was in *rem*, it was wholly independent and could not in any manner be affected by adverse claims, or even by subordinate or subject claims. The *res* was the mortgagor's interest conveyed in mortgage; that would pass by the sale under the decree without regard to outstanding titles whether adverse or subordinate.

Callanan could only be made a party by some allegation which would authorize a decree cutting off his right to redeem from the mortgage by paying off the mortgage debt. Such a decree does not operate upon his title, but upon him; in this respect it is personal. The only allegation in the bill in relation to Callanan or his interest in the property is, "Your orator further avers that defendants James Callanan, Abram Rutt and Geo. L. Gow *claim some interest* in and to a portion *of said premises, the exact nature of which your orator is unable to set out.*"

This may be admitted, it is wholly immaterial without more. It, of course, can make no difference how much or how little it may be, or what its character so for as the remedy against the mortgagor and the mortgagor's interest in the property is concerned. It is wholly immaterial if it is or is claimed to be adverse or paramount to the mortgagor's title. It can only be material if it is subject to the mortgage, and only then because it gives the claimant the right to pay off the mortgage—not as authorizing any decree adjudicating it, or for its sale or barring it. Upon such an allegation he can be made a party, simply to bar his equity of redemption. But the existence or claim of

such interest is jurisdictional, and must be alleged. The allegations of the bill are not sufficient; it is not averred, and it cannot for jurisdictional purposes be assumed that he had or claimed any interest in the mortgagor's property, or in the property described in the mortgage junior, inferior, or in any manner subject to the mortgage. There was nothing he was called upon to answer, to deny or avoid, nothing to ask for, and it follows, nothing which upon his default to appear authorized any decree whatever against him or his title to the property.

A decree must be founded on and sustained by both the allegations and the proofs in the cause, and it cannot be based on a fact not put in issue by the pleadings.

2 Dan'l Pr., 1003, *n.* 6.

In the case of *Windsor vs. McVeigh*, 18 Wall, page 283, it is said:

The decree of a court of equity upon oral allegations without written pleadings, would be an idle act of no force beyond that of an advisory proceeding of the chancellor.

Jurisdiction is the right to hear and determine, not to determine without hearing.

The court can only hear what is alleged, the evidence must be confined to the allegations.

Proofs taken in a cause must be pertinent to the issue in that cause, *secundum allegato.* * * * Evidence relative to matter not stated in the pleadings nor fairly within their general allegations, is impertinent and cannot be made the foundation of a decree.

A decree entirely outside of the issue raised is *coram non judice*, and will be so adjudged even when assailed in a collaterally proceeding.

1 Danl. Ch. Pr., 853 and note.

"After an order has been pronounced for taking a bill *pro confesso*, the bill, or an examined copy thereof, is to be taken and read in any court of law or equity as evidence of the facts, matters and things therein contained, in the same manner as if such facts, matters and things had been admitted to be true by the answer of the defendant put into such bill."

1st Danl. Ch. Pr., 531.

In the case of *Graham vs. Railroad Company*, 3 Wall, 712, the court say, reviewing cases cited:

But neither of these cases assert the doctrine maintained here for appellants, that a court of equity may decree between defendants when neither pleadings nor proof show any controversy or adverse interest between them; nor have we been referred to any case which does assert that doctrine.

The admission by default is no more than an admission by demurrer, and in either case the decree must be limited to what is admitted, if enough is alleged to warrant a decree, and if there can be no decree on demurrer there can be none on default.

A decree *pro confesso* can only be taken upon the facts stated in the bill.

Lawrence vs. Steele, 10 Hump., 280.

The court has no jurisdiction, in an action to foreclose a mortgage, to bar or foreclose any title, or right, of any party to the suit by decree. The title to property cannot be arbitrarily transferred from the owner to another by decree of court, nor can the owner be arbitrarily barred or foreclosed from setting up his title against an adverse claimant. There must be some basis for it in some suit or proceeding where it is the appropriate relief to which a party to the proceedings is entitled upon the case made or stated.

In a suit to foreclose a mortgage in the federal courts in this district the title to the mortgaged property cannot be barred or foreclosed, except by sale. No title except the title conveyed by the mortgage can be decreed to be sold, because the decree must be based upon the mortgage. It follows that no title adverse to that of the mortgagor, not subject to it, can be barred or foreclosed by decree.

The sufficiency of the bill to sustain a decree rendered upon default is to be determined by its allegations, and not by its prayer. But assuming that a defendant should look not only to the allegations made, but also to the relief asked, what necessity was there for Callanan to have answered in that case to protect his title to the property, against any decree that should, or any valid decree that could, be rendered in it upon default. It prays for "a decree of foreclosure of the said mortgage against the premises hereinbefore described against all of the before named defendants, and that the right, title and in-

terest of each and every of said defendants, be by the decree of this court, forever barred and foreclosed"—of course in the manner provided by law and the rules of the court, by the sale of the mortgagor's interest, and cutting off the equity of redemption.

There is no intimation even in the prayer of the bill that any sale, except under and in pursuance of the mortgage, or of any right or title not conveyed by it, should be decreed to be sold, or that any right, title or interest which did not entitle the holder to redeem should be foreclosed.

Passing now to the decree (45-50). It treats the interest of the defendant as a lien junior and subject to the mortgage. It declares complainant's claim "is a lien upon the mortgaged premises prior and paramount to the lien of each and every of defendants." That is, that the interest of Callanan, upon which the decree operates, attaches to, is a lien on, the same title or interest that the mortgage attaches to. It does not undertake to dispose of or affect any claim of Callanan in the premises, except such as he may have under the mortgagor, junior and inferior to the mortgage. The statement of this relation of the liens of the mortgagee and of Callanan could not be predicated of the rights of the complainant under his mortgage from Bates, and Callanan's claim to be the owner of the property by title adverse to that of Bates. The only decree that the declared relation of the liens authorized with reference to them was to cut off the possible equity of redemption, which might, but which it was not alleged did exist, by reason of a junior lien held by Callanan. It did not authorize a decree barring title which was adverse, and paramount to the title of the mortgagor, in the absence of any allegation giving a right to render one for any purpose. It provides that "the right, title and equity of redemption of each and every of the defendants in this suit be by a sale of the said mortgaged premises hereunder, forever barred and foreclosed, and that the purchaser at such sale shall take the premises sold by title absolute and

such title shall relate back to the date of the execution of the mortgage to complainant."

The only lien claimed by the complainant in the foreclosure suit was the lien created by the mortgage from Bates to it. This is the only right in the property which could in any event be sold. The mortgagor's title was the only one which could in any manner be barred or foreclosed. The decree, so far as it purports to bar and foreclose the right and title of the defendants, fairly construed, can only be operative upon the right and title which was conveyed as security for the mortgage debt, the only right and title which the mortgage covered, or which could be decreed to be sold under, and of course the only title that could be barred and foreclosed, by the sale; and so far as it operates to bar the equity of redemption, it is necessarily limited in its effect to the parties who have some relation to the mortgagor's title, junior and subject to the lien of the complainant's mortgage.

See *McComb vs. Spangler*, 12 Pacific R., 349.
Graham vs. Railroad Co., 3 Wall, 704.
Rathbone vs. Hooney, 58 N. Y., 467.

The decree construed as settling or adjudicating the adverse claims to the property between Callanan and the mortgagor, or as directing the sale of his right and title, or as barring and foreclosing his right and title without sale, or as estopping him from defending a suit against him to recover the property, based upon the foreclosure of a mortgage, which conveyed no interest for the want of title in the mortgagor, is outside of any question raised in the record, or which could have been raised or tried in it, and is, therefore, one which the court had no authority or jurisdiction to render.

In the case of *McComb vs. Spangler*, 12 Pacific R, 347, the defendant claimed title under proceedings foreclosing a mortgage executed by Elizabeth McComb to which John McComb, her husband, was made a party. The court, in the statement of the case, say:

"The complaint in that action—The foreclosure suit—contained no averment either that the defendant, John McComb, had or asserted any claim adverse to the title of the mortgagor or that any claim he had was subject to the lien of the plaintiff's mortgage. (In this the analogy to the case at bar is perfect.) It alleged him to be the husband of Elizabeth, and that she mortgaged property which was her separate property. But he was not called upon to take issue on either of these averments. He could not to any purpose assert his adverse legal title in that action since its validity could not properly be determined therein; and he was not required for the protection of his rights to make an issue, which the court of equity would have refused to try in the suit of foreclosure. Nor could he say as against the mortgagee that the mortgage did not operate as a lien on her estate if she had any. The question whether she had any interest and estate as between herself and the mortgagee, or whether she could or could not deny as against the mortgagee an interest or estate, was one with which John McComb personally had no concern, inasmuch as his paramount title would not be affected by the decree."

The court say in the opinion:

"In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to that of the mortgagor, and who therefore denies the efficacy of the mortgage as a lien on his own title, cannot properly be joined as a co-defendant. Such an adverse claim to the land in opposition to the mortgage cannot be tried in the equitable action to foreclose. So far as the mere legal rights are concerned in such an action, the only proper parties are the mortgagor and mortgagee and those who have acquired rights under them subsequent to the mortgage. The mortgagee or other holder of the mortgage cannot make one who claims prior and adversely to the title of the mortgagor a defendant for the purpose of trying his adverse claim. The object of a sale to foreclose a mortgage under our law is to obtain the sale of the estate which the mortgagor had at the time he executed. All persons beneficially interested in the estate mortgaged are proper parties to the suit. Titles adverse to that of the mortgagor are not the proper subject of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance."

In *San Francisco vs. Lawton*, 18 Cal., 474, it is said:

Where a party has a right under the mortgage, also a right prior to it, he is not precluded in respect to the prior right by a judgment of fore-

closure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage and subsequent to it can properly be litigated upon a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. If he has a claim under the mortgage also, his claim prior to it cannot be divested by the decree. This prior claim is not a subject-matter of litigation in the foreclosure suit, and remains unaffected by it. The decree is final only within the proper scope of the suit, which is to bar interests in the equity of redemption. The decree can have no effect upon the rights of parties having priority *whether they* are made parties to the action or not.

In *Peters vs. Bowman*, 98 U. S., 56, it was alleged as a defense in a foreclosure suit for purchase money that there was an outstanding paramount title. The court say, on page 59, "it is the settled law of this court that, upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the purchase money, and when there has been no fraud and no eviction, actual or constructive, * * * *no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit;* such a bill would be multifarious and there would be a misjoinder of parties." Citing *Noonan vs. Lee*, 2 Black, 499, *Dial vs. Reynolds*, 96 U. S., 340—and further—page 60, "when an adverse title is claimed it cannot be litigated with binding effect unless the claimant is before the court, and we have shown that he can not be made a party. *One suit cannot thus be injected into another.*"

In *Dial vs. Reynolds*, 96 U. S., 340, the court on page 340 say: "It is well settled that in a foreclosure proceeding the plaintiff cannot make a person who claims adversely to both mortgagor and mortgagee a party and litigate and settle his rights in that case."

In *Roberts vs. Wood*, 38 Wis., 60—a foreclosure suit—one of the defendants, Norton, answered setting up title in himself to the mortgaged premises, *subsequent to the mortgage, but paramount thereto, under a tax deed.* Upon this answer the bill as to Norton was dismissed. The court on page 68 say:

The defendant Norton claimed under a title which, if valid, was paramount to the mortgage interest although subsequent thereto in time. It is well settled that the validity of his title cannot properly be litigated in this action.

Citing *Strobe vs. Downer*, 13 Wis., 10, and *Pelton vs. Farmin*, 18 Id., 222; and further:

It was said by Mr. Justice Payne, in *Pelton vs. Farmin*, that if the party alleged to claim some interest subsequent and subject to the mortgage, claims none, he should disclaim, and the suit should be dismissed as to him. There is no such formal disclaimer in the answer of Norton, *but the assertion by him of a paramount title is equivalent thereto.*

In *Pelton vs. Farmin*, 18 Wis., 222, it was alleged as to a part of the defendants that "they have or claim to have some interest in said mortgaged premises or in some part thereof, which interest or lien, if any, has accrued subsequent to the lien of said mortgage and is subject thereto." These defendants answered, alleging *a paramount title* to portions of the premises, *under tax deeds.* The plaintiff demurred, the grounds of demurrer being that the paramount title "did not constitute a defense to the action," and "that the issue tendered by said portion of the answer is not cognizable in this equitable action, but is purely of legal cognizance." The demurrer was by the lower court overruled, which was held erroneous on appeal. The court on page 228 say: "Without saying what might be the effect when a paramount title was set up in a foreclosure case *and litigated without objection*, and a judgment rendered, involving a decision upon such title, we decide simply that *neither party is bound to litigate such a title in such a way.*"

In *Summers vs. Bromley*, 28 Wis., 125,—a foreclosure suit—it was alleged as to part of the defendants that "they have or claim some interest in the said mortgaged premises or in some part thereof as purchasers, mortgagees or otherwise which interests, if any, have accrued subsequent to the lien of the said mortgagee and are subsequent thereto." These defendants plead title paramount and the case *was tried upon that issue.* The court below "decreed foreclosure and sale, in the ordinary form, and, in terms, provided for barring defendants and for

giving possession to the purchaser." On appeal it was held "not competent in a foreclosure suit, *whatever the pleadings*, to proceed to litigate and settle the rights of a party who sets up a legal title which, if valid, is adverse and paramount to the title of both mortgagor and mortgagee,"—and further, that "if that was possible, in any case, a bill which simply brings in the adverse claimants under the usual allegation in foreclosure bills against purchasers and incumbrancers, *is not properly framed to raise such an issue or to support a decree upon the title of such adverse claimants.*" It this is good law, and we have found nothing to the contrary, it necessarily follows that Callanan had the right to assume that nothing more was intended than what the pleading imported, and that no issue would be decided that was not raised by the bill, and that he might, therefore, with safety, submit to a default and decree *pro confesso*.

Rathbone vs. Hooney, 58 N. Y., 463, was an action of ejectment by a trustee against the purchasers at a foreclosure sale under a mortgage, executed by the trusee, of property in which he had an interest, in his own right, and, as trustee, but which latter interest it was not in his power to bind by mortgage. He not having been described as trustee in the foreclosure suit, and the defense being that the defendant acquired the trust estate, or at any rate that the plaintiff was, by the judgment in the foreclosure suit, estopped to deny that he did, it was held to be "The proper purpose and scope of a foreclosure suit to bar interest *in the equity of redemption*, and that the decree does not affect rights *paramount to those of the mortgagor or mortgagee.*" On page 467 the court say:

> The title which the plaintiff in this action assert as trustee *is consistent with the judgment in the foreclosure suit.* That judgment was final for its own proper purpose and object and no further.

In *Short vs. Noonan*, 16 Kan., 220, "The plaintiff Short commenced an action against Fletcher and wife and E. J. Noonan on a promissory note and a real estate mortgage made to secure the note, alleging in his petition 'that Fletcher execu-

ted the note, that Fletcher and wife executed the mortgage, and that the said defendant Noonan has or claims to have some interest in or lien upon said premises as described in said mortgage deed, but plaintiff is ignorant of the nature and extent thereof and does not know whether the said defendant Noonan has at this time any subsisting lien upon said premises, and he demands proof of the same;' and plaintiff then prayed for a judgment against Fletcher for the amount of the note, and for a decree against all the defendants for the foreclosure of said mortgage deed and that the premises be sold," etc. There were no other allegations in the petition against Noonan. Held "that said petition does not state facts sufficient to sustain or uphold any judgment against Noonan, and especially not a judgment barring all right, title and interest of Noonan in and to said premises. It lacks an allegation showing that Noonan's claim *is junior or inferior to the mortgage lien of the plaintiff.*" The court on page 226 say:

> What did Noonan admit by his default—by not answering to said petition? He merely admitted the truth of the allegations therein contained—nothing more, nothing less. He admitted that he, Noonan, 'has or claims to have some interest or lien upon said premises as described in said mortgage deed, that plaintiff is ignorant of the nature and extent thereof and does not know whether Noonan has at this time any subsisting lien upon said premises, and the plaintiff demands proof of the same.'

Eagle Fire Co. vs. Scut, 6 Paige, 635, holds that, "Upon a bill to foreclose a mortgage the mortgagee has no right to make a person, whose claim is prior to the mortgage, and, who claims the legal title to the premises adversely both to the mortgagor and mortgagee, a party to the suit, for the purpose of testing the validity of his legal title to the mortgaged premises."

In *Corning vs. Smith*, 6 N. Y., 82, it is held that when a defendant, in a foreclosure suit, "made such as subsequent purchaser or incumbrancer, in his anwer, sets up a claim adverse to the title of the mortgagor, and anterior to the mortgage, the plaintiff should dismiss the bill as to him, unless he is pre-

pared to prove that such claim in fact arose subsequent to the mortgage."

In *McDonald vs. Mobile Life Ins. Co.*, 56 Ala., 468, it was held that "A decree *pro confesso* is an admission only of the facts which are well pleaded, and cannot aid or supplement defective averments"—and, "That the admission by default is no more than an admission by demurrer, and in either case the decree must be limited to what is admitted, if enough is alleged to warrant a decree, and, if there can be no decree on demurrer, there can be none on default."

In *Winham vs. Crutcher*, 3 Tenn. Chy., 666, it is held that a decree *pro confesso* can only be taken "upon the facts stated in the bill."

Windsor vs. McVeigh, 93 U. S., 274, was an action of ejectment. The defendant relied upon title under a decree of condemnation upon proceedings in the district court of the eastern district of Virginia, for the confiscation of the land. It was claimed that the court had acquired jurisdiction, and had a right to decide every question which arose in the cause, and that its judgment, however erroneous, could not be collaterally assailed. The court held that the proposition, as a general one, was undoubtedly correct, but, like all general propositions, was subject to many qualifications in its application, on pages 282–3 it said:

*All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable. * * * Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * **

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it.

The statement of the doctrine by Mr. Justice Swayne, in the case of Cornell vs. Williams, reported in the 20th Wallace, is more accurate:

"*The jurisdiction,*" *says the Justice,* "*having attached in the case, everything done within the power of that jurisdiction when collaterally questioned is held conclusive of the rights of the parties, unless impeached for fraud.*"

Bigelow vs. Forrest, 9th Wall, 351 U. S., was an action of ejectment for land sold under a decree of confiscation. The court say on page 351:

It was argued on behalf of this defendant *that the decree of confiscation by the district court of the United States is conclusive that the entire right, title, interest and estate of French Forrest was condemned and ordered to be sold, and that as his interest was a fee simple, that entry fee was confiscated and sold. Doubtless a decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest. Had it done so, it would have transcended its jurisdiction.*

In the case of *Day vs. Micou*, 18 Wall., 156, it is said, (page 160) citing the case of *Bigelow vs. Forrest*, *supra*:

We then determined that under the act of congress, of July 17, 1862, known as the confiscation act, and the joint resolution of the same date, explanatory thereof, only the life estate of the person for whose offense the land had been seized, was subject to confiscation and sale. We also determined that nothing more was within the jurisdiction or judicial power of the district court, and that, consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale.

And further, page 162—

Decrees of courts of probate or orphan's courts directing sales for the payment of a decedents debts or for distribution are proceedings in rem. So are sales under attachments, or proceedings to foreclose a mortgage quasi proceedings in rem at least. But in none of these cases is anything more sold than the estate of the decedent, or of the debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected.

The *res* in mortgage foreclosures is the right of the mortgagor in the property mortgaged, the thing sold under the decree. No other rights are in any manner affected except as they are subordinate to the mortgage, and these only to the extent that the right which they gave to pay off the mortgage is foreclosed by the decree and the sale under it.

Any right, title or interest in the property adverse to the mortgage, not in any manner subject to it, is not brought under the jurisdiction of the court by allegations in the bill that the party claims, a subject and inferior interest in it.

In the case of *Ex parte Lange*, 18 Wall., 163, Miller, J., after giving illustrations of judgments void because in excess of the authority of the court, and forbidden by the constitution, citing the case of *Bigelow vs. Forest*, *supra*, says, page 177:

In opposition to this it was argued that the decree of the court confiscating the property in terms ordered all the estate of the said Forrest to be sold, and that though this part of the decree might be erroneous, it was not void. Here was a case of proceeding in rem where the property was within the power of the court, and its authority to confiscate and sell under the statute beyond question, but the extent of that power was limited by the statute. The analogy to the case before us seems almost perfect.

And further, on the same and following page, after quoting the language quoted above from *Bigelow vs. Forrest*, and referring to *Day vs. Micou*, 18 Wall., *supra*, says the decrees therein were invalid—

Not because the court wanted jurisdiction of the property, or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment operative upon the same property, it rendered one which included that which it had a right to render and something more, and this excess was held simply void.

Assuming, for the present, that the decree in the foreclosure suit here in question is in terms operative upon the title of Callanan, which we question, the analogy of these cases to the case at bar is so nearly perfect as to render them conclusive as authority in this, against the existence of the jurisdiction of the court to render it.

Here is a case of a proceeding *in rem* where the property was within the power of the court and its power to sell, and by the sale to bar the equity of redemption of those who had a right to redeem, but this was the extent of that power, not as limited by statute, but by principles and rules as well set-

tled and determined as if fixed by statute. "It had full jurisdiction to render one kind of judgment operative upon the same property; it rendered one which included that which it it had a right to render and something more." This excess is void. To the extent of the sale of the mortgagor's title and barring the equity of redemption from the mortgage by the sale, it was valid. So far as it operates upon an independent, adverse title, to sell or transfer it under the decree for the sale of the mortgage property, or to bar or foreclose it without sale, or as an adjudication that it was invalid, it is in excess of the jurisdiction of the court, and void.

The analogy, however, is not perfect. In the cases cited, the court had power over the property, and over the person to render judgment of confiscation. In the case at bar, assuming that enough had been stated in plaintiff's bill to foreclose to give the court jurisdiction of Callanan or to make him a party for any purpose, his title was in no proper sense under its power; it was not challenged and could not be; its validity could not have been adjudicated, even if brought forward by him for that purpose.

The court in the case of *Windsor vs. Mc Veigh*, *supra*, quote the following from the opinion of Judge Story in the case of *Bradstreet vs. Neptune Insurance Co.*, 3 Sum., 601, in which the effect of a sentence of condemnation of property by a Mexican court for the violation of the revenue laws of Mexico was involved:

> It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate and clear.

And condemnation without such opportunity for defense is characterized in the same opinion as "but a solemn fraud if it is clothed with all the forms of a judicial proceeding" and the proceedings "as mere mockeries and in no just sense judicial proceedings" and such as "ought to be deemed both *ex*

directo in rem, and collatterally, mere arbitrary edicts or substantial frauds." Among other things it is also said that when conclusive effect is sought "to be given to such sentences there should have been proper judicial proceedings upon which to found the decree; that is, there should *have been some certain written allegations of the offense or statement of the charge for which the seizure was made, and upon which the forfeiture was sought to be enforced.*"

Following these quotations, the court, in the opinion, in the principal case, says:

> This language, it is true, is used with respect to proceedings *in rem* of a foreign court, but it is equally applicable and pertinent to proceedings *in rem* of a domestic court, when they are taken without any monition or public notice to the parties.

In the bill filed in this case there is no allegation attacking Callanan's title, no claim made to any lien upon or any interest in it, nothing in the subpœna served upon him to give him notice that any adversary proceedings are pending, or that the complainant claims any other right than to sell the mortgagor's interest in the property to pay the mortgagor's debt. His title was not challenged; if he had appeared he could not have set up his title as a defense to any relief that the plaintiff claimed. The land was not sold for his debt; he could not have been heard in opposition to the decree of sale. If he is not now allowed to assert his title, he is denied the right to his property, it is, in effect, condemned or confiscated, by a decree in a case where the title was not and could not have been in controversy or adjudicated or barred by any decree which the court had authority to render, upon the theory that it heard what was not alleged, that more was confessed than was stated, that more was proved than could be, and that the decree which operates to destroy defendant's title is simply erroneous and not void.

The question of Callanan's title to the property was manifestly not "*heard and determined*" by the court. The decree as rendered is not the *decree* of the court.

It was prepared, and, doubtless without fraud or intentional wrong, entered without judicial consideration. "It is in no just sense a judicial sentence," but a "solemn fraud though clothed with the form of judicial proceedings."

C. H. GATCH,
WILLIAM CONNOR,
For plaintiffs in error.

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OCT. 17 1887
JAMES H. McKENNEY,
CLERK.

IN THE

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OCTOBER TERM, 1887.

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A. M. HEFNER, MRS. A. M. HEFNER, IRA BABCOCK AND MRS. IRA BABCOCK, PLAINTIFFS IN ERROR,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DEFENDANT IN ERROR.

Reply to Argument for Plaintiffs in Error.

C. H. GATCH AND WM. CONNOR, FOR PLAINTIFFS IN ERROR.
B. F. KAUFFMAN, OF COUNSEL FOR DEFENDANT IN ERROR.

DES MOINES:
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vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error*.

C. H. GATCH AND WILLIAM CONNOR, *for Plaintiffs in Error.*

B. F. KAUFFMAN, *of Counsel for Defendant in Error.*

REPLY TO ARGUMENT FOR PLAINTIFFS IN ERROR.

We have been furnished with a copy of printed brief of plaintiffs in error, and will notice some of the positions therein taken.

Counsel for plaintiffs in error appreciate the fact that we should look to the character of the title of Callanan in determining whether or not he was properly made a party to the foreclosure suit.

It is claimed that a tax title is a new and independent title, and that it was not derived from the mortgagor, and *Crum vs. Cutting*, 22 Iowa, 411, is cited to sustain that statement. We invite attention to that case. The question as to the nature of the tax title was not important in the case, but the discussion

shows clearly that the point under consideration was whether the tax title passed simply the interest of the owner, in whose name the land was listed for taxation, or a good title, free from incumbrances placed there by the owner. The intimation is that the latter is the proper view, and with that doctrine we have no contest.

But the above is entirely consistent with the doctrine for which we contend.

What is a tax title, and how is it derived? The land is first assessed by fixing a valuation upon it, which is to be made the basis of a levy. The proper county board then makes the levy. The land is assessed to the owner, if known, and the amount of tax is a personal charge against such owner.

Dubuque vs. Ill. Cent. R. R. Co., 39 Iowa, 56.

The statute makes this tax also a lien upon the land. The law fixes a time for payment of the tax. If the owner does not pay the tax the treasurer may levy upon any personal property or real estate of the person against whom the taxes are assessed, to make the tax.

Code of 1873 of Iowa, Secs. 857, 858, 859, and 865.

Or he may advertise and sell the land for such taxes.

If the proper preliminary steps are taken, and within the time fixed by law no redemption is made by the owner, after due notice given (Sec. 890 and 891), the purchaser or his assignee is entitled to a deed for the land, to be executed by the treasurer.

Now what is the effect of this sale and deed? It passes the title to the land, but from whom?

The state had no title; the county treasurer had no title. Is it not a fact that it is simply the exercise of a sovereign power to execute a conveyance which shall pass and convey the title of the real owner, and, if you please, of all parties interested in the land, as lien-holders or otherwise, to the purchaser at the tax sale?

It is immaterial by what name we designate this title. The

exact fact is that an authorized official executes a conveyance which passes the title formerly held by others (in this case confessedly by Bates) to the purchaser at the tax sale.

The government does not assume to *create* a title. If so, why should there be a *sale* of the land? Why should the statute give a right of a redemption from such sale by the owner? If the purpose and effect of these proceedings be *creative*, why sell the land at all? We need not play upon words or seek by a single name to define this title.

The important fact remains, which we discuss on pages 13, 14, 15, and 16 of our former brief, that the effect of these proceedings, if carried forward according to law, was to wholly *displace* complainant's mortgage and give the absolute ownership to Callanan. Callanan concedes the goodness of complainant's mortgage when it was executed. What he asserts is that by virtue of his tax title the right to foreclose this mortgage has been *lost*, and an absolute ownership vested in him. That, whereas Bates owned the land in 1870, and executed a valid mortgage to complainant in August of that year, which could be enforced and foreclosed and be thus made the basis of an indefeasible title, yet because of the tax proceeding this ownership of Bates and this lien of the company are vested in Callanan, or to say the least, in some other way *lost* to the mortgagee, and a title freed from both vested in Callanan.

And yet, notwithstanding all this, Callanan says he *has no defense to a foreclosure of this mortgage.*

Is this sound doctrine? Could he not have defensively and successfully resisted this foreclosure?

Herein we have the distinction which exists between the case at bar and the ordinary case of adverse titles in foreclosure suits. The latter class of cases proceeds upon the hypothesis that whatever title was held by the mortgagor continues to exist, and whatever the mortgage at the date of its execution operated upon as a lien, it continues to hold, and that of this interest the mort-

gagee is entitled to a foreclosure, irrespective of a claim of title by some other person, and therefore such outstanding title cannot be interposed in the pathway of the foreclosure suit.

But the attitude of Callanan is radically different. If his title be what he claims for it, the company had nothing to foreclose. It held a lien upon nothing, and there was nothing remaining in Bates, the mortgagor, upon which such a foreclosure could be based. There was nothing whatever upon which a decree could operate, and there was an utter absence of the *res* or of the person representing it, essential to a valid foreclosure proceeding.

If this be true, then no decree could have been rendered in the absence of Callanan. The only party who could successfully resist it was Callanan. He, and he alone, held in his own hands, if his title was good, a weapon of complete *defense*. He was not only a proper defendant, but an *indispensable* one. Without him no decree could be entered.

Can it be, therefore, that he can now successfully affirm that with a perfect and complete defense to this foreclosure suit, he could after personal service stand dumb and let a decree go against him, foreclosing a mortgage against a foreclosure of which he, and he alone, held a complete defense?

We submit that inasmuch as the object of the proceeding was a *foreclosure*, and inasmuch as he was made a party and personally served, and inasmuch as he was thereby called upon to make *defense* thereto, if any he had, and inasmuch as he stood armed with that which if plead would have constituted a good defense, and would have shown that complainant was entitled to no decree against the land covered by his deed, that not only might he have plead it, but it was his duty to do so; that the necessary effect of the decree was to adjudge that complainant was entitled to a decree of foreclosure as against him to which it was not entitled had he plead his tax title as a defense; that he is bound by that decree and adjudication.

B. F. KAUFFMAN,

Counsel for Defendant in Error.

P. C. KENYON, LAW BRIEF PUBLISHER.

123-747
120-747

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vs.

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ARGUMENT FOR DEFENDANT IN ERROR

C. H. GATCH AND WM. CONNOR,
FOR PLAINTIFFS IN ERROR.

B. F. KAUFFMAN, OF COUNSEL,
FOR DEFENDANT IN ERROR.

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A. M. HEFNER, ET AL.,
Plaintiffs in Error,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendants in Error.

ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

The case is this: On the 23d of August, 1870, the Northwestern Mutual Life Insurance Company, defendant in error herein, loaned to Isaac Bates the sum of ten thousand dollars, taking to secure the same, the bond of said Isaac Bates, secured by a mortgage upon a quantity of real estate, including among other tracts the real estate in controversy herein.

Default having been made in the payment of certain installments of interest on this mortgage, the company, on the 31st day of October, 1876, filed its bill for the foreclosure of the mortgage, in the United States circuit court, for the then district of Iowa.

These proceedings in foreclosure went to decree and sale, and a master's deed was thereupon executed and delivered to the company as the purchaser of the property at the master's sale.

To this proceeding in foreclosure James Callanan, under whom the plaintiff in error in this suit claims, was made a party, and duly served with the process of subpœna, and default and decree taken against him.

Thereafter this suit at law was brought by the defendant in error against the plaintiffs in error, claiming under James Callanan by purchase from him.

The petition in ejectment set forth all the foreclosure proceedings and the title derived by the company thereunder, and alleged that Callanan, the party under whom the plaintiffs in error claim, was barred of his right and interest in the said property by virtue of said proceedings in foreclosure.

The plaintiffs in error answering in the court below admit the foreclosure proceedings, and that Callanan was a party thereto, and duly served, but they set forth that the said Callanan, claimed under an adverse title, and that the decree in foreclosure did not have the effect of barring his right, title and interest in and to the said land, and that he held the said property free of any effect thereon by virtue of the foreclosure proceeding, and set forth that his title is a tax title, and alleged the manner in which it accrued.

To this answer a demurrer was interposed by the defendant in error, the said company, in which demurrer the following causes were assigned:

First. The facts alleged in said answer do not constitute any defense, for that, notwithstanding the existence of the said facts, the rights of the said James Callanan were fully barred and foreclosed and cut off by the said proceedings in foreclosure set up in the plaintiff's amendment to its petition.

Second. Nothing in the said answer is stated that in law would avoid the effect of said foreclosure decree as a foreclosure of the right and interest of the said James Callanan in and to the said real estate in a collateral proceeding.

Third. The said answer admits the foreclosure proceedings set up in the plaintiff's amendment to its petition, and there is no fact set up therein that avoids the effect thereof in this collateral proceeding.

This demurrer was sustained and the plaintiffs in error electing to stand upon their answer in the court below, judgment

was thereupon entered in favor of the defendant in error, and against the plaintiffs awarding a writ of possession against the plaintiffs and in favor of the defendant in error for the said property.

The case was heard before Hon. J. M. Love, district judge, southern district of Iowa, and Hon. O. P. Shiras, district judge, northern district of Iowa, and a certificate of division of opinion was granted, which certificate is found at pages 20–24 inclusive of the printed transcript, in which the following questions are certified to this court:

First. Did the decree entered by default against James Callanan in the foreclosure proceedings have the effect of adjudicating the question of title on the part of Callanan and debar him and his grantee from asserting his adverse title as a defense in the present action?

Second. Did the court in the foreclosure proceedings under the allegations of the bill, have jurisdiction of the question of adverse title, so that its decree upon a default will defeat the assertion of such a title on the part of one of the defendants or his grantees?

Third. As the decree in terms purports to bar all the right, title, and equity of redemption of defendants, including Callanan, is it or not binding upon him and his grantees, even though erroneous so that it cannot be attacked in a collateral proceeding?

Fourth. If the court in the foreclosure proceedings could not properly hear and determine questions of adverse title, must not the decree being by default be limited in its effects solely to such matters as were properly cognizable by the court in the foreclosure proceedings and be so construed as to bar all claim upon the part of Callanan to a lien upon the reality, but leaving the question of adverse title to the mortgagor and mortgagee untouched?

The facts upon which the points certified to arises are also stated in the certificate.

The answer discloses the following facts as to the tax title: The land became subject to taxation for the year 1870. The taxes for that year were not paid. A sale of the one hundred and sixty acres in question was made by the county treasurer on the 15th day of November, 1871, for the sum of $8.77 for each of the forty acre tracts embraced therein, and upon the 1st day of December, 1874, a tax deed was executed to James Callanan for the whole of the quarter section.

The bill in foreclosure respecting the interest of James Callanan in the property alleged as follows:

Your orator further avers that the defendants James Callanan, Abram Rutt and George L. Gow claim some interest in and to a portion of the said premises, the exact nature of which your orator is unable to state;

And then proceeds to pray that each and all of the defendants thereinbefore named, including the said James Callanan,

Be made parties to this bill, and that they be severally required to answer the allegations herein, and that your orator have judgment against the said Isaac Bates for the various sums of money, etc.

Naming the amount to which the bill shows the complainant was entitled, and proceeds further as follows:

Your orator further prays that it may have a decree of foreclosure against the premises hereinbefore described against all of the above named defendants, and that the right, title and interest of each and every one of the defendants be, by the decree of this court, forever barred and foreclosed, and that the master in chancery of this court be authorized to make a sale of the said property, or sufficient thereof to satisfy the said several sums of money, with interest thereon, and the costs of this suit, and all and singular such relief as your orator is equitably entitled to receive.

The bill then proceeds to pray for a writ of subpœna against each and all of the said defendants, including the said Callanan, in accordance with the rules and practice of the court. Callanan was personally served with the writ of subpœna, and made default, and a decree was thereupon entered, in which it was adjudged that James Callanan with other defendants was in default, and said default was, by the terms of the decree, confirmed. The court further found the amount of money due to the complainant, and that it was a first lien upon the premises, and prior and paramount to the liens of the other defendants, and it was further expressly adjudged and decreed by the court in the said decree—

That the right, title and equity of redemption of each and every of the defendants in this suit, be, by the sale of the said mortgaged premises hereunder forever barred and foreclosed, and the purchaser shall take the premises sold by title absolute, and such title shall relate back to

the date of the execution of the mortgage to complainant, to-wit: August 23, 1870.

The master's deed was executed pursuant to the terms of this decree, the complainant having bought the premises at the sale under said decree, and the said sale being confirmed by the court.

ARGUMENT.

It is contended by the plaintiffs in error, who claim under James Callanan, one of the defendants in the foreclosure suit, that, inasmuch as the interest of Callanan in the said property was represented by a tax deed, the title passing thereunder is an adverse title, and, that not only was the foreclosure not the proper proceeding in which to contest validity of that title, or to adjudicate its character, but that the proceedings were *coram non judice*, and absolutely void as to Callanan.

These propositions we deny.

I.

Was the foreclosure proceeding the proper case in which to determine the rights of Callanan under his tax deed?

It is, of course, manifest that this question is not an essential one to the determination of the case, for though it be conceded that the foreclosure proceeding was not the proper one in which to litigate the validity of the tax title, it by no means follows that the proceedings were absolutely void for want of jurisdiction, or that they must be held to be absolutely invalid in a proceeding such as this is.

It is important, in considering the question as to the appropriateness of the proceeding in foreclosure to determine the interest held by Callanan, to consider the nature of his interest under the laws of the state of Iowa.

It will be seen that the taxes for the year 1870 were not levied until the first Monday in September of that year.

See laws of the extra session of the eighth general assembly

of the state of Iowa, page 32, of section 2, by which it was provided that the board of supervisors should, on the first Monday in September, in each year, levy the several taxes, etc., etc. Such has been the law ever since 1860, it being re-enacted in the Code of 1873, section 839.

Therefore, at the time of the execution of the mortgage to secure the loan of ten thousand dollars, to the Northwestern Mutual Life Insurance Company (hereafter in this argument designated as the company) the taxes in question had not been levied, and were, of course, no lien upon the property.

The mortgage to the company was confessedly the first and paramount lien upon the real estate. Therefore whatever interterest Callanan may have acquired by virtue of the proceedings thereafter had, such interest was acquired subsequent to the execution of the mortgage to the company.

By the laws of the state of Iowa, taxes, after they are levied, are made a lien upon real estate (see Revision of 1860, Sec. 759, Code of 1873, Sec. 865). Therefore, after the levy of taxes for 1870, in the month of September, the state and county acquired a lien upon the real estate in question for the taxes for that year. This lien continued until the sale of the land for delinquent taxes on the 15th of November, 1871. After that time the claim for taxes still existed as a lien upon the land, but in favor of the purchaser instead of the state and county. Callanan therefore continued to hold this lien for the amount of the taxes, shown by his bid of $8.77 upon each forty acres of land, until the expiration of the three years given by our statute to redeem, and until he procured his deed, on the first day of December, 1874, when, if all the provisions of the statute had been complied with, and everything done in due and proper form, he would have become the owner of the land under his tax title. But he took this title subject to an assault, for any reason, which, under the provision of the statute, or the course of decisions of the courts of the state of Iowa, would render

his tax title invalid. In any event, however, he became subrogated to the rights of the state and county as to the lien for taxes, if any, paid by him.

Everett vs. Beebe, 37 Iowa, 452.
Light vs. West, 42 Iowa, 138.
Besore vs. Dosh, et al., 43 Iowa, 211.
Sexton vs. Henderson, et al., 45 Iowa, 160.
Miller vs. Corbin, et ux., 46 Iowa, 150.
Springer, et al., vs. Bartle, 46 Iowa, 688.

And this rule applies to subsequent taxes paid by the tax purchaser.

Claussen & Keuhl vs. Rayburn, 14 Iowa, 136.

That the interest of the tax purchaser prior to the execution of a deed, is that of a lien holder only. See

Revision of 1860, Sec. 779.
Code of 1873, Sec. 890.
Williams vs. Heath, 22 Iowa, 519.
Eldridge vs. Keuhl, 27 Iowa, 160, 174.
Lake vs. Gray, 35 Iowa, 44.
Mallory vs. French, 38 Iowa, 431.

It is unnecessary for our present purpose that we should enumerate the various causes for which a tax deed will be held to be invalid as such, and the interest of the holder thereof held to be that of a lien only for the taxes paid by him and interest, and possibly for penalties accruing thereon. It is sufficient to say that these cases are almost innumerable, many of them being defined in the law itself, and many of them being established by the course of adjudication of the supreme court of the state of Iowa.

It will be seen, however, from an inspection of the cases first above cited, that if for any reason a tax deed or title should be held to be invalid, the interest of the purchaser under the invalid tax title is that of a lien holder for the amount of the taxes actually paid, interest, etc.

A tax deed may, therefore, be evidence of a title or may be evidence of a lien, only, and it is for the courts to determine whether it is in fact a title or only a lien.

With this brief view of the nature of tax deeds, we are to consider whether or not the foreclosure proceeding was the proper one in which to determine the question of the character of the interest in fact held by Callanan under this instrument purporting to be a tax deed, set out by him as an exhibit to his answer (see transcript of record, page 17, exhibit "A").

It seems to us there is no good reason for denying the right of the court to pass upon the character of the interest held by Callanan, in the foreclosure proceeding.

Suppose Callanan had in that case set up his claim under his tax title; it would have enabled the complainant immediately to amend its bill, setting forth the reasons why the tax deed was invalid as evidence of title, and showing that the interest of Callanan was that of a lien holder only, having a right to reimbursement for the taxes paid by him, with interest and penalties.

If Callanan's title was good there should have been no decree of foreclosure against his property at all, and by appearing in that case he might have resisted the foreclosure as to the one hundred and sixty acres claimed by him under the tax deed. If an assault by the complainant upon that title had proved unsuccessful, certainly the court would not have decreed a foreclosure of the mortgage as against his property after determining the goodness of his title. Such a proceeding would have had the effect only to cast a cloud upon his title by virtue of the foreclosure proceedings and the master's deed; and certainly, inasmuch as courts of equity seek to *remove* clouds upon titles, they ought not to sit for the purpose of creating them.

Therefore Callanan, if his title was good, had a perfect defense to this foreclosure by asserting it. If, having asserted it, and thus afforded the opportunity to the complainant by

amending his bill to assail it, and to show that he had a lien only, clearly this investigation would come properly within the province of the court in the foreclosure proceedings, and proper orders would have been made as to the distribution of the proceeds of the sale, and the complainant would, of course, have been entitled to a foreclosure of his mortgage against the property, and Callanan to his taxes paid, interest and penalties.

The question of the right to the decree of foreclosure against this property depended upon the character of his interest in it, and this investigation was directly in the pathway of the proceeding to foreclose the mortgage, and we can see no good reason why, in such a case, it is not the proper subject for inquiry and investigation. That it is so has been held in the somewhat analagous case of—

Kelsey vs. Abbott, 13 Cal., 616.

In that case it was objected after the tax title had been set up by one of the defendants that a court of equity in the foreclosure suit had not jurisdiction over it. The court, however, held otherwise, and proceeded to try the question of the validity of the tax title on its merits, and determined it against the validity of the title.

See, also, as instances of litigation of adverse rights in a foreclosure suit

Sargent vs. Wilson et al., 5 Cal., 505.
Marks et al. vs. Marsh, 9 Cal., 96.

The doctrine of those cases is expressly approved by the supreme court of the state of Iowa in the case of

Chase vs. Abcott, 20 Iowa, 154.

See also—

Larson vs. Reynolds & Packard, 13 Iowa, 579.

Also in point—

Lee vs. Kingsbury, 13 Texas, 68.
Baxter vs. Dean, 24 Texas, 17.

Another class of cases of increasing importance may be referred to in connection with the discussion of this subject, to-wit: the foreclosure of railway mortgages.

In these foreclosure suits it is now the common, and undoubtedly the correct practice to allow parties having rights of any kind or character in or to the subject-matter of a foreclosure or any part thereof, whether it be upon the road-bed or track, or upon the rolling stock or parts and parcels thereof, or adverse claims to specific property covered by the mortgage, to come into the case by an intervention, or otherwise, and assert their rights, whatever they may be to the property covered by the mortgage and to determine the respective rights of all the parties thereto. Indeed we think it must be admitted that the scope of a foreclosure suit and of the powers usually exercised by a court of chancery over the subject-matter of a foreclosure have been in practice very much extended in recent years, andas we submit, properly so.

Suppose Callanan had not been a party defendant in this foreclosure suit, but had appeared by intervention and asked leave to assert his interest, and show by reason of its character that complainant was entitled to no foreclosure against the property—that the lien originally given it by virtue of the mortgage had been extinguished by virtue of the sale of the property for taxes followed by the deed would the court have denied him this right? Certainly to do so would have been against the common practice of the courts of the present day.

There is no reason why litigation should be prolonged or suits multiplied by requiring, for example, that the complainant in the foreclosure suit in question in this case should have been compelled to complete its foreclosure and perfect its title to this particular one hundred and sixty acres of land, as against Bates, the mortgagor, in order that it might have a standing to contest with Callanan the question as to whether he had a title or a lien only.

Only five years are given by the Iowa statute within which to assail tax sales, and pending the foreclosure suit, this time might have expired, thus cutting off the right of the complainant to assail the title before it had even an opportunity to do so. Suppose, for example, that the decree in foreclosure had been appealed from, and a supersedeas filed; before the case could have reached a hearing in this court, and a sale had, the right to assail the tax title of Callanan, or to question the interest held by him under the tax title would have been absolutely barred by the provisions of the laws of the state of Iowa.

Revision of 1860 of Iowa, Sec. 790.
Code of 1873, Sec. 902.

If, therefore, the position of the plaintiff's in error be true that the only remedy of the complainant the mortgagee is to foreclose his mortgage without making Callanan, though interested in the property covered by the mortgage, a party to the suit, and proceed with the foreclosure suit until title is acquired through the foreclosure proceedings, and then by a new bill in equity or suit at law, as the case may demand (for under the provisions of the statutes of Iowa, in many cases it must be by bill in equity, and in all cases may be) assail the tax deed and show the interest of Callanan to be only a lien, the necessary result would be that before the mortgagee could clothe himself with the right to assail the interest of Callanan in any way, the time within which Callanan's interest could be assailed would be barred, as we have seen, by the statute. Another objection to such a position is, that the purchaser at the sale, whether complainant or third party, is absolutely unable to determine how much he can afford to pay for the property upon which the tax title is claimed. His bid must be purely speculative, and dependent entirely upon the result of litigation which can only be instituted after he secures his title (?) through the sale. As further bearing upon the question as to what may be properly litigated and determined in a foreclosure proceed-

ing, we call attention to the question that has been made in some of the courts as to whether a prior mortgagee may be properly made a party to the foreclosure suit. The current of authority seems to be, at present, favorable to the determination of all questions of priority between the mortgagees.

See *Board of Supervisor vs. Mineral Point R. R. Co., et al.*, 24 Wis., 93, and the brief of Hon. Matt Carpenter in that case.

It is now the uniform practice to make all the lien holders, whether prior or subsequent, parties to the foreclosure suit that the rights and priorities of all the parties may be determined, and it is uniformly held that there should be but one sale under a foreclosure of mortgaged property, the proceeds being applied to the payment of the various liens in the order of their priority. It would seem to be strange indeed, that a court of equity in a foreclosure suit cannot exercise the power of determining the relative priorities of different mortgages. It would seem to be one of the most important functions of a court of equity in a foreclosure suit to do this. Why not equally so in the case of adverse claimants of the property? It is essential that the purchaser at the foreclosure sale should know what interest he is buying, and it is no answer to say to him that he must take his own chances as to the title upon which the mortgage operated at the time it was executed, or as to whether that title has been *subsequently divested* or extinguished by proceedings at a tax sale, or by any other proceedings. It still remains true that the purchaser at the sale should know what title or interest he gets by the purchase.

This is for the interest of all the parties concerned. If that interest or title can be made certain the mortgagor is benefited in the enhanced price obtained for the property, and in the increased amount of his indebtedness which will be paid by it, and so all the incumbrancers are likewise benefited, and the purchaser is not misled. The most important question in such a proceeding may be, which mortgage is prior, or whether an

alleged claim is, in fact, a good and valid adverse claim against the property. Suppose it should be held that such rights, whether in favor of a prior mortgage or in favor of a so-called adverse claimant's can not be determined in a foreclosure suit, and suppose that upon an investigation in another suit therefor it is found that the so-called adverse claim instead of being a title is only a lien, the result of that proceeding is a determination that it might have been determined in the former suit, and that the holder of the adverse claim might have been made a party thereto. In short, the position of the defendant in error is that the plaintiff has no right to assert in a foreclosure proceeding the invalidity of the tax title of Callanan; that it has no right to aver and show that it is simply a lien and nothing more, and no right to try such a question, but that it must take a foreclosure against this property and becloud the title of Callanan if it shall turn out to be a good one; by the foreclosure sale which passes no interest whatever to complainant if Callanan's deed shall be held to be good, before it is in a position to aver in a judicial proceeding that such deed is bad.

We cannot believe that such is the proper analysis of the situation as presented by the facts of the case at bar whatever may be the general rule.

It must not be forgotten that the character of the claim of Callanan is such as that, if his deed be valid, it affects the lien of the mortgage just as it does the title of Bates, the mortgagor.

By the bill to foreclosure this mortgage, the complainant asserted as against all of the defendants a lien upon all of this property by virtue of its mortgage. If Callanan obtained a good title by virtue of his deed, the effect of that deed was to *cut off* the mortgage which theretofore had confessedly rested as a lien upon the land. The very thing which affected the title of Bates, the mortgagor, cut off also the lien of the mortgagee. In this situation why should not the mortgagee call upon the holder of this deed to defend a foreclosure suit, in which the issue

is one of lien or no lien, and of a right to foreclose and sell all of this land to pay the debt?

We have already undertaken to show why a foreclosure upon this land upon which Callanan held a tax deed, ought not to have been decreed if his title was good. We now submit that complainant had *no right*, legal or equitable, to a decree of foreclosure upon this one hundred and sixty acres of land, if the deed to Callanan passed to him a good title. In such a case as this it cannot be true that Callanan, if he had come in and plead his title, could have been put off by a dismissal as to him, the court meanwhile retaining jurisdiction of the *land* upon which he held a deed, for the purpose of a foreclosure. Callanan had a right to resist this foreclosure, *defensely*, by asserting his acquisition of the *very title upon which complainant* claimed a lien.

It is quite different from the case where two separate and independent titles are claimed. It is in this case conceded that Bates held the title to this land on the 23d of August, 1870, when complainant took its mortgage. But Callanan claims to have acquired *this very title* by the subsequent tax proceeding. His claim is not adverse in the sense in which that term is used in connection with titles in foreclosure suits.

He claims the very title Bates formerly had. He claims, therefore, *under* Bates. He claims the title Bates mortgaged to complainant.

It is as against this title that complainant seeks a foreclosure, and upon which it asserts a lien. Be it distinctly understood that his assertion of title in himself is entirely consistent with a good title in Bates and a valid lien by way of mortgage in 1870. While *adverse titles*, as the phrase is commonly used, refers to titles *inconsistent* with the goodness of the title and lien of the mortgagor and mortgagee at the date of the mortgage.

In the ordinary case of adverse titles, the theory of the foreclosure suit is that the mortgagee is entitled to a foreclosure as

against whatever interest his mortgage operated as a lien upon, be it an indefeasible title or not. This thought is illustrated by the case of *Peters vs. Bowman*, 98 U. S., 56, where as against the foreclosure of the vendor the vendee was not permitted to set up a hostile outstanding title.

But the case at bar is widely different. The identical title upon which complainant's mortgage rested was the title claimed by Callanan, not a different or other title.

It was the land owned by *Bates* that the county treasurer sold to Callanan. The county treasurer became the instrument by which this land hitherto held and owned by Bates was conveyed to Callanan.

Callanan stands, therefore, conceding the ownership of Bates, and asserting no claim adverse to that prior ownership of Bates, and not denying the validity of the mortgage to complainant, at the time it was executed; but he claims, not that he has another title, but that he has acquired the Bates title and is now the absolute owner of the land, and that the lien of the mortgage has been *lost or extinguished* by the tax proceedings.

How, then, can it be claimed that he has not a perfect defense to the foreclosure suit in which the lien which he claims has been extinguished and removed from the property is the very one that is asserted against him and his property? It seems to us it would be most remarkable doctrine to hold that Callanan had no defense to this foreclosure suit and was not a proper party. If his deed was good, his defense to the foreclosure suit was perfect. If not good, he was properly barred by the decree. He thus stood in a situation radically different from that of the holder of a title derived from other parties than the mortgagor. He comes exactly within the rule which requires persons claiming under the mortgagor to be made parties. It makes no difference that his title was not derived by negotiations direct with Bates. The statute made the county treasurer the agent to sell this land theretofore belonging to Bates, and *convey* it to the

purchaser. This has been done, and Callanan claims under this conveyance.

We confidentially submit that he was a proper, and indeed a necessary party to the foreclosure suit, and that his deed, if good, armed him with a complete and perfect defense to the foreclosure suit, and that the effect of the decree was to adjudge that he had *no defense*, and he is now bound thereby.

But, though it may be held that this foreclosure should have proceeded against all of the property covered by the mortgage, including the quarter section covered by Callanan's tax deed, and that the complainant should then have brought his action at law, or in equity, as he might be advised to assail the tax title, it would not follow that the adjudication had in this case of the title of Callanan, holding that whatever title or interest he may have had should pass to the purchaser at the sale, would be void.

We therefore come to the consideration of the question.

II.

Is the decree in the foreclosure proceeding, which adjudges that all of the right, title and interest of the defendant, Callanan, together with the other defendants shall, by the sale of the mortgaged premises be forever barred and foreclosed, and that the purchaser at such sale shall take the premises sold by title absolute, which title shall relate back to the date of the execution of the mortgage, to-wit: The 23d day of August, 1870, absolutely void and of no force, and does it leave open to Callanan the right to relitigate the matter of his interest in the property?

The plaintiff in error contends that he is by such a decree left free to contest with the purchaser, under the foreclosure sale, the question of his interest in the property.

The case of *The Board of Supervisors vs. Mineral Point R. R. Co., et al.*, 24 Wis., 93, was a very well considered case,

and ably argued by counsel, and the briefs of counsel appear in the report of the case. In that case the various points relied upon by the plaintiff in this case were discussed and reviewed, and a very thorough review of the authorities was had by the court.

In deciding the case the court used the following language:

> It is freely admitted that a foreclosure suit is not an appropriate proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor, and that, if such rights be so litigated, and be determined upon pleadings and proofs, the decree will be erroneous, and will be reversed. But whether, until reversed, such decree is *coram non judice*, and void so that it may be collaterally impeached, is quite another question. *The conclusion would seem to follow, from all of the decisions, that it is not.*

The exact point here referred to was held not to be involved in that case, but the expression of the court upon it is shown to be the result of a careful investigation of the authorities which were copiously cited by the learned counsel concerned in the case.

Freeman, in his work on judgments, adopts the same view of the law (paragraph 303), and uses the following language:

> If a court undertakes to determine claims hostile to the title of the mortgagor, its decree will certainly be erroneous and liable to reversal in an appellate court; but it is not *coram non judice* and void. On the contrary, it is valid until reversed, and is not subject to any collateral attack.

We call attention to the fact that these were cases where the adverse title was hostile to that upon which the mortgage operated at the time of its execution, and in that respect quite different from the case at bar, as we have before seen.

See, also, as bearing upon the question under discussion, the case heretofore cited of *Kelsey vs. Abbott*, 13 Cala., 616, where a tax title was set up and determined upon its merits in a foreclosure proceeding against objections by the owner of the tax

title. And also, for examples of settlement of adverse interests, see the cases already cited of—

Sargent vs. Wilson, et al., 5 Cal., 505.
Marks and wife vs. Marsh, 9 Cal., 96.
Chase vs. Abbott, 20 Iowa, 154.
Larson & Reynolds vs. Packard, 13 Iowa, 579.
Lee vs. Kingsbury, 13 Texas, 68.
Baxter vs. Dean, 24 Texas, 17.

We also call attention to the provisions of the statutes of Iowa upon the subject of foreclosure and its effect. Section 3312 of the Code of 1873, provides:

The purchaser shall take all the title and interest on which the mortgage operated.

Section 3317 provides:

That the right of the mortgagee to foreclose, as well as the amount claimed to be due, my be contested by any one interested in so doing.

In the first branch of this argument we have called attention to what seems to us to be the undoubted right of Callanan to have resisted the foreclosure of this mortgage upon the one hundred and sixty acres of land claimed by him. If he held in fact a valid tax title upon the land, it appears to us that there can be no question about his right to plead such interest or title in defense of the foreclosure suit as to the land claimed by him; and, as we have already seen, this position was taken in the case of *Kelsey vs. Abbott*, 13 Cal., *supra*. As to the true doctrine upon the question of former adjudication, we beg to refer to Freeman on Judgments, section 249, and we quote a large part of the section.

There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, writ of error or other proceeding provided for its revision. * * * It is a universal principle, that where power or jurisdiction is delegated to any public officer or tribunal over

a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under acts done, and the public or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal is taken. After judgment on the merits the parties cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment. * * * An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.

These propositions are supported by the learned author by a large number of the decisions referred to in the notes. In the quotations in one of the notes the following proposition is laid down:

"The failure to plead matters of defense which might have been pleaded is a waiver of them forever."

Dewey vs. Peck, 33 Iowa, 242.
Lawrence, S. B., vs. Stevens, 46 Iowa, 429.
Murrell vs. Smith, 51 Ala., 301.
Kelly vs. Donlin, 70 Ill., 378.
Gaines vs. Kennedy, 53 Miss., 103.
Covington & C. B. Co. vs. Sargent, 27 Ohio State, 233.

The doctrine of the effect of a former judgment has recently undergone very thorough discussion in this court, resulting in the decision given in *Cromwell vs. County of Sac*, 94 U. S., 351. It is conceded to be one of the clearest expositions of the doctrine ever delivered by any court. It is in that case held that a former judgment is absolutely conclusive with respect to

the cause of action involved therein; that, with respect to a different cause of action it is conclusive as to the questions actually made and decided therein.

We submit that the application of this doctrine to the case at bar must result in sustaining the decree entered in the foreclosure suit as to the interest of the defendant, James Callanan.

First. Because his plea of an outstanding valid tax title would have been a good defense to the foreclosure suit, as to the land claimed by him.

Second. Because the very matter in issue in the foreclosure suit was the lien of complainant and its right to a foreclosure against *all* of the property, and if the lien having once become operative had been lost or extinguished, complainant would not have been entitled to a decree as against these lands.

Third. Because the complainant was entitled to a disclosure of Callanan's interest in this property, and was entitled, by an amendment to its bill, to assail his tax title and show that Callanan's interest was that of a lien only upon the property, for taxes.

Fourth. By the terms of the decree it is expressly found and adjudged by the court that the title of Callanan, whatever it may be, and all title, right and interest held by him, passed to to the purchaser at the sale, which purchaser, it is expressly decreed, should take title absolute to the property, and this determination of the court, by its decree (which decree, as will be seen by the record, was signed by one of the judges of this court), was not without jurisdiction.

The judgment and decree of the court upon this question, it having jurisdiction of the person of Callanan, and of the whole of the property, and therefore of the parties and subject-matter, was not *coram non judice*, and it cannot be collaterally assailed, and the purchaser took title absolute under this decree according to its very terms. If it was erroneous, Callanan should have appealed therefrom, or should have appeared and set up his in-

terest and plead his defense. Having failed to do so he is bound by its provisions.

From the opinion in this case (*Cromwell vs. Sac County*, 94 U. S., 357), we make the following extract:

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgement as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in any other action between the same parties upon a different claim of cause of action. In the former case, the judgment if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed.

In *Harris vs. Harris*, 36, Barb. 88, Judge Hodgeboom says:

The general rule on this subject is well known to be, that a former judgment of the same court, or of a court of competent jurisdiction, directly upon the point in issue is, as a plea, a bar, or as evidence, conclusive, between the same parties, or others claiming under them, upon the matter, directly in question, in a subsequent action or proceeding.

And he adds—

Such judgment or adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have had litigated and decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.

In *Lee vs. Kingsbury*, 13 Texas, 70, the court say:

So long as the judgment remains in force it is in itself evidence of the right of the plaintiff to the thing adjudged and gives him a right to pro-

cess to execute the judgment (10 Peters, 449). It is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment (1 Greenleaf Ev., Sec. 534).

Mr. Bigelow, in his work on estoppel, in a note on page 46 thus states the doctrine:

It follows also from the authorities considered, that a valid judgment for the plaintiff sweeps away every defense that should have been raised against the action; and this, too, for the purposes of every subsequent suit, whether founded on the same or a different cause.

Tuska vs. O'Brien, 68 N. Y., 448, is also in point. In that case the plaintiff in the second suit was a purchaser from one of the other defendants, who in turn had bought from Valk Brothers, who *thereafter* had attachments issued against them, by creditors, and subsequently they became bankrupt. The assignee brought a suit in equity, making all of these persons defendants, claiming the sale to plaintiff to be fraudulent, and was finally awarded the fund. In the first suit plaintiff in the second appeared and set up paramount title in himself, and it seems he also disclaimed any interest in the fund in court, but claimed the property. Notwithstanding all this, the court held that the order of court awarding the fund to the assignee in bankruptcy was an adjudication as to the ownership of the goods as against the purchaser who acquired his title before the rights of attaching creditors accrued and before the bankruptcy. Among other things the court said:

The principal point urged by the learned counsel for the plaintiff is that the decree simply disposed of the fund in court, that the plaintiff in this action disclaimed any right or interest in the same, and has, notwithstanding that decree, a right to prosecute this action for the property. It is true that the decree is confined in terms to a disposition of the fund obtained by the sheriff on the sale of the goods, but a judgment is conclusive not only of the point which it professes to decide, but of matters which it was necessary to decide (4 El. and Bl., 788, 794). It is conclusive of the thing directly decided and of every fact essential to the adjudication (5 Wright, 402).

In *Peterson vs. Thomas*, 28 Ohio St., 596, the court held that—

Whenever a matter is finally determined by a competent tribunal it is considered at rest forever. And this principle embraces not only what was actually determined, but every other matter which the parties might have litigated in the case.

In *Bates vs. Spooner*, 45 Ind, 489, the same doctrine was announced, and that, too, in a case where the question raised in the second suit was not made or decided in the first suit. The court among other things say:

This power to hear and determine constitutes jurisdiction. As Bates and Neil were in court, and as they suffered the attachment proceedings to progress and the order to be made for the sale of the attached property without raising any question in respect to its liability to attachment, we think they now are estopped to raise any question in that respect. *They are bound by the judgment which they might have interposed to prevent.*

See also the case of *Campbell vs. Ayres*, 1 Iowa, 257.

But it may be claimed by counsel for plaintiff in error that if it shall be held that the foreclosure proceeding was not the proper one in which to set up the tax deed as against the foreclosure, then the language of the decree should be limited in its effect, and should not be held to embrace a determination of Callanan's interest in the property. It is evident, however, that the court below had no trouble about the meaning of the language of decree. The third question stated in the certificate of division is in the following language:

As the decree in terms purports to bar all the right, title and equity of redemption of defendants, including Callanan, is it or not binding upon him and his grantees, even though erroneous, so that it cannot be attacked in a collateral proceeding?

It is evident from this statement of the proposition that the court were not divided upon the proposition that the decree "purports to bar all the right and title of Callanan."

The fourth proposition simply propounds the query whether, notwithstanding the language of the decree, purporting, as it does, to bar his entire interest, as above stated, its effect shall not be limited as stated in the question.

There can be no doubt as to the purpose and scope of the decree. After providing that the right and title of Callanan

with other defendants be forever barred, as if to emphasize the purpose of the decree it provides further—

And the purchaser at such sale shall take the premises sold by title absolute; and such title shall relate back to the date of the execution of the mortgage.

It is manifest, therefore, as the court below without difficulty held, that the purpose of the decree was to give to the purchaser at the sale a title absolute as against all of the defendants, including Callanan. Hence we have the contention by plaintiffs in error that this decree as to that matter is absolutely void.

If it be granted for the sake of the argument that it is erroneous in this particular, it by no means follows that it is void or that it can be collaterally assailed; and the judgment of the court below upon this proposition was, as we submit, correct.

The correct doctrine is so well stated by this court in *Vorhees vs. United States Bank*, 10 Peters, 449–473, that we cannot do better than give an extract:

So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be more reasonable, than that the person who complains of an injury done him, should avail himself of his legal rights in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitation on writs of error and appeals; if that time elapses, common justice requires, that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion. A judgment or execution irreversible by a superior court, can not be declared a nullity by any authority of law; if it has been rendered by a court of competent jurisdiction of the parties, and the subject-matter, with authority to use the process it has issued, it must remain the only test of the respective rights of the parties to it. If the validity of the sale under its process can be questioned for any irregularity preceding the judgment, the court which assumes such power places itself in the position of that which rendered it, and deprives it of all power of regulating its own practice or modes of proceeding in the progress of a cause of judgment. If, after its rendition, it is declared

void, for any matter which can be assigned for error, only on a writ of error or appeal; then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails, that any proceeding of a court of competent jurisdiction can be declared to be a nullity, by any court, after a writ of error or appeal is barred by limitation, every county court, or justice of the peace in the Union, may exercise the same right, from which our own judgments or process would not be exempted. The only difference in this respect between this and any other court is, that no court can revise our proceedings; but that difference disappears after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or of any state; they stand on the same footing in law.

The errors of the court do not impair their validity; binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority.

The line which separates error in judgment from the usurpation of power, is very definite; and is precisely that which denotes the cases where the judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution.

It would be a well-merited reproach to our jurisprudence, if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of the court, should not have the same protection under an erroneous proceeding, as the party who derived the benefit accruing from it. A purchaser under judicial process, pays the plaintiff his demand on the property sold; to the extent of the purchase money, he discharges the defendant from his adjudged obligation. Time has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from converting the absolute right of the plaintiff to the full benefit of his judgment; and it shall not be permitted that the purchaser shall be answerable for defects in the record, from the consequence of which the plaintiff is absolved. Such flagrant injustice is imputable neither to the common nor statute law of the land.

If a judgment is reversed for error, it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitu-

tion only of the money; the purchaser shall hold the property sold; and there are few, if any, states in the Union who have not consecrated this principle by statute. This rule, established for the protection of purchasers on the faith of judicial process, will be utterly prostrated; encouragement will be given to defendants in judgment, their heirs and privies, to take advantage of the security into which honest purchasers have been lulled, if any judicial proceeding which could stand the test of a writ of error or appeal, if taken in time, or had become irreversible directly, could be avoided collaterally.

It is undoubtedly true that by the rulings of this court it has been held that there are certain classes of adverse titles that should not be litigated in a foreclosure suit.

Peters vs. Bowman, 98 U. S., 56.
Dial vs. Reynolds, 96 U. S., 340

But suppose in the case of *Dial vs. Reynolds*, the court below had decided that the parties might litigate the adverse title and they had proceeded to do so and there had been no appeal, would any one doubt the effectiveness of the decree?

We now refer briefly to the cases relied upon by the plaintiff in error, and which, we think, do not sustain their position.

Lewis vs. Smith, 9 N. Y., 502, involved the question as to whether a claim for dower was barred by a previous foreclosure suit of a mortgage, to which proceeding the wife was a party.

The court held it did not. The foreclosure suit was brought and prosecuted to a determination, prior to the death of the husband, so that the interests of the wife was inchoate only.

The court in that case, however, took care to say that—

It is not intended to decide that if a party claiming a title prior to the mortgage should be made a party to the suit and should answer and litigate the question and should have a decree against him, it would not include him in a collateral action."

This is a concession of jurisdiction to hear and determine the question. The court in the case at bar having determined that the title of Callanan should be barred, and that the purchaser should take as against all of the defendants, including him, a title absolute, it is not a case of want of jurisdiction.

It may be further said, respecting this case of *Lewis vs. Smith*, *supra*, that it is in opposition to the view expressed by the supreme court of the state of Iowa in the cases from that state to which we have already referred.

The case of *Rathbone vs. Hooney*, 58 N. Y., 463, was a case where it was claimed that the interests of Mrs. Brown, as trustee, for certain beneficiaries was barred by a former suit to which she was a party. It is manifest that her interest as trustee could not be effected by the former proceedings, for, as trustee, she was not a party to the suit, in any sense whatever.

The case of *Summers vs. Bromley*, 28 Mich., 125, was a direct proceeding by appeal to correct the decree of the court below, and it is not applicable to the question under discussion.

Likewise is the case of the *Eagle Fire Company vs. Lent et al.*, 6 Paige's Chancery, 635..

The case of *Merchant's Bank vs. Thompson*, 55 N. Y., 7, follows the case of *Lewis vs. Smith*, *supra*, in the same state and is of the same character in its facts but the opinion in the case, it seems to us, concedes the point now under discussion, that, if a title was, in fact adjudicated, it would simply be an erroneous proceeding and not a void one.

The case of *Corning vs. Smith*, 2 Sheldon (N. Y.), 82, was also a direct proceeding on appeal, but the opinion of the court contains the intimation, that it is the duty of the chancellor in a given case to determine whether or not the adverse claim is of a character that ought to be litigated in the case and to act accordingly.

It will be observed that all of these cases are from the state of New York, except one, (28 Mich., 125.)

We submit that in none of these cases is it determined that if the court had decreed, as in the case at bar, that the title, or interest whatever it may be, of the defendant (Callanan) is absolutely barred and shall pass to the purchaser at the foreclosure sale who shall take title absolute, such determination is absolutely void and may be collaterally assailed.

It is further to be noticed that none of these cases involved any such interest as that derived by Callanan under his tax deed, and none of them are in conflict with the position we maintain as to the proper course of proceeding as against a party claiming to hold a tax title, under the facts and circumstances disclosed by the case at bar.

We submit, therefore—

First. That Callanan was a proper party to the foreclosure suit, and that his tax deed, if good, presented a perfect and complete defense to the foreclosure of the mortgage as to the land covered by it, and he was bound to put it forward as a defense or by proper plea.

Second. That the decree having passed, it was thereby determined that the lien of the mortgage as to all of the property covered by it, continued a valid lien, and had not been lost or extinguished, and this was necessarily determined as to all of defendants, including Callanan; and this finding, as well as that of a right to foreclosure of the mortgage as against Callanan, *inheres* in the decree, and these things could not have been adjudged as against Callanan and his one hundred and sixty acres of land if his tax deed had been plead and found to be good.

Third. That the decree, purporting on its face to bar all the right, title and interest of Callanan, and decreeing that the purchaser should take a title absolute, said title to relate back to the 23d day of August, 1870, necessarily covered the subsequently acquired interest or title of Callanan, and, whether erroneous or not, is not void or subject to collateral attack, and the judgment of the court below is therefore correct.

Respectfully submitted,

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Of Counsel for Defendant in Error.